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United States  
Circuit Court of Appeals  
For the Ninth Circuit. 1084

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PACIFIC COAST PIPE COMPANY, a Corpora-  
tion,

Appellant,

vs.

CONRAD CITY WATER COMPANY, a Corpora-  
tion, PONDERA VALLEY STATE BANK,  
a Corporation, CONRAD BANKING COM-  
PANY, a Corporation, CONRAD TRUST &  
SAVINGS BANK, a Corporation, CONRAD  
MERCANTILE COMPANY, a Corporation,  
JAMES T. STANFORD, Receiver, and  
PARIS B. BARTLEY, Trustee,

Appellees.

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Transcript of Record.

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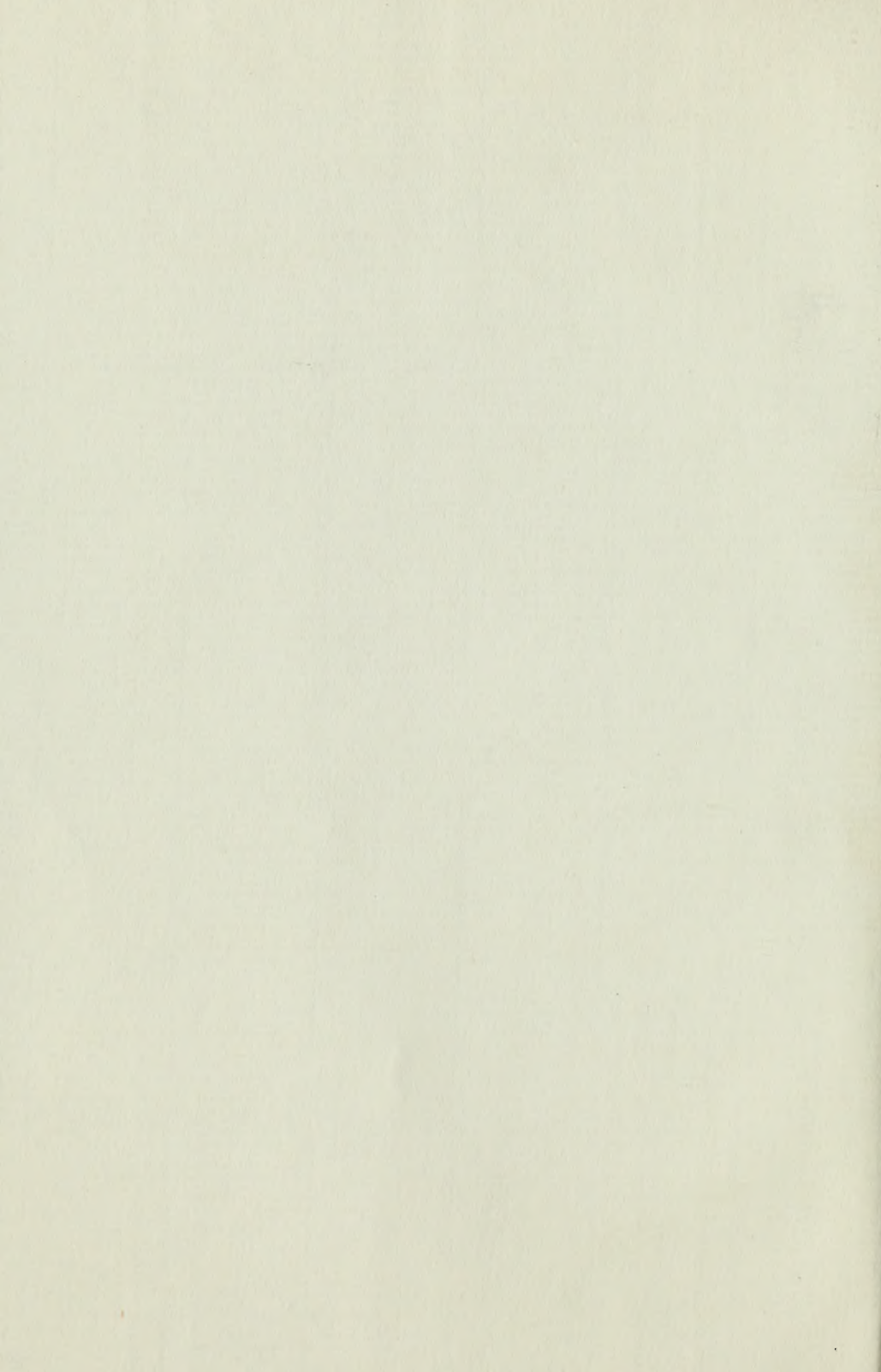
Upon Appeal from the United States District Court for the  
District of Montana.

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Filed

APR 7 - 1917







**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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Appellant,

vs.

CONRAD CITY WATER COMPANY, a Corporation,  
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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Alias Execution in Pacific Coast Pipe Co. v. Conrad City Water Co. ....	110
Answer .....	19
Appearance of Conrad City Water Company in Conrad Mercantile Co. v. Conrad City Water Co. et al. ....	112
Assignment of Errors .....	123
Attorneys of Record, Names and Addresses of..	1
Bill in Equity.....	2
Bond on Appeal .....	124
Certificate of Clerk U. S. District Court to Transcript of Record .....	130
Citation on Appeal .....	127
Decision .....	117
Decree .....	48
 EXHIBITS:	
Exhibit "A"—Order Appointing Receiver in Conrad Mercantile Co. v. Conrad City Water Co. ....	37
Exhibit "A" to Bill in Equity—Notice of Attachment .....	17
Exhibit "A" to Complaint in Conrad Mercantile Co. v. Conrad City Water Co....	74

Index.	Page
EXHIBITS—Continued:	
Exhibit “B”—Order Appointing Receiver in Pondera Valley State Bank v. Con- rad City Water Co. et al.....	40
Exhibit “C”—Order Appointing Receiver in Conrad Mercantile Co. v. Pondera Valley State Bank, etc.....	46
Plaintiff’s Exhibit “A”—Excerpts from Minute-book of Conrad City Water Co.	50
Defendant’s Exhibit 5—Complaint in Con- rad Mercantile Co. v. Conrad City Water Co. ....	62
Defendant’s Exhibit 6—Complaint in In- tervention of Pondera Valley Trust Bank as Trustee, etc. ....	81
Defendant’s Exhibit 7—Appearance of Conrad City Water Co. ....	112
Defendant’s Exhibit 10—Petition of Pon- dera Valley State Bank for Leave to Intervene in Conrad Mercantile Co. v. Conrad City Water Co.....	114
Defendant’s Exhibit 11—Order Granting Leave to Pondera Valley State Bank to File Complaint, etc. ....	115
Defendant’s Exhibit 12—Order Granting Motion of Pondera Valley State Bank to Intervene, etc. ....	116
Names and Addresses of Attorneys of Record...	1
Order Certifying, etc., Statement of Evidence..	121
Order Extending Time to March 5, 1917, for Re- turn to Citation on Appeal.....	129

Index.	Page
Petition on Appeal .....	122
Praecipe for Transcript of Record.....	128
Return of U. S. Marshal to Writ of Attachment in Pacific Coast Co. v. Conrad City Water Co. ....	109
Statement of Case .....	49
TESTIMONY ON BEHALF OF PLAIN- TIF:	
BARTLEY, P. B. ....	58
Cross-examination .....	59
DARLING, MARK S. ....	49
HAGER, BEN .....	57
KELLY, PATRICK .....	59
Cross-examination .....	59





**Names and Addresses of Attorneys of Record.**

Messrs. DAY & MAPES, of Helena, Montana,  
Solicitors for Plaintiff and Appellant.  
O. W. McCONNELL, Esq., of Helena, Montana,  
J. A. McDONOUGH, Esq., of Great Falls, Montana,  
Solicitors for Defendants and Appellees.  
[1\*]

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*In the District Court of the United States in and for  
the District of Montana.*

IN EQUITY—No. 55.

PACIFIC COAST PIPE COMPANY,  
Plaintiff,

vs.

CONRAD CITY WATER COMPANY et al.,  
Defendants.

BE IT REMEMBERED that on May 14, 1915, the  
plaintiff filed its Bill of Complaint herein, being in  
the words and figures following, to wit: [2]

*In the District Court of the United States, District  
of Montana.*

PACIFIC COAST PIPE COMPANY, a Corpora-  
tion,

Complainant,

vs.

CONRAD CITY WATER COMPANY, a Corpora-  
tion, PONDERA VALLEY STATE BANK,  
a Corporation, CONRAD BANKING COM-

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\*Page-number appearing at foot of page of original certified Transcript  
of Record.

PANY, a Corporation, CONRAD TRUST and SAVINGS BANK, a Corporation, CONRAD MERCANTILE COMPANY, a Corporation, JAMES T. STANFORD, Receiver, and PARIS B. BARTLEY, Trustee,  
Defendants.

### **Bill in Equity.**

Comes now the complainant in the above-entitled action and for cause of action against the above-named defendants, complains and alleges:

1. That the complainant is and was at all of the times hereinafter mentioned, a corporation organized and existing under the laws of the State of Washington and engaged in business at the city of Seattle in said State and a citizen of the said State of Washington.

2. That each of the defendants, the Conrad City Water Company, the Pondera Valley State Bank, the Conrad Banking Company, the Conrad Trust and Savings Bank and the Conrad Mercantile Company is a corporation organized and existing under the laws of the State of Montana and engaged in business in said State and a citizen of the State of Montana; that each of the defendants James T. Stanford and Paris B. Bartley is a citizen of the State of Montana.

3. That the amount involved in this controversy, exclusive of interest and costs, exceeds the sum or value of three thousand dollars (\$3,000). [3]

4. That the defendant, the Conrad City Water Company, is and has been ever since the 26th day of August, 1910, a corporation organized under the laws of the State of Montana for the purpose of



constructing and operating a system of water works in the town of Conrad in the county of Teton, State of Montana, and engaged in supplying the inhabitants of the said town with water. That on the 16th day of October, 1913, this complainant commenced in this court, an action against the defendant, the Conrad City Water Company, to recover the sum of Eight Thousand Seven Hundred Forty-eight Dollars and Fifty-five Cents (\$8,748.55) with interest thereon at the rate of eight per cent (8%) per annum from the 28th day of February, 1913, and costs of suit, being the amount due upon a certain promissory note dated the 7th day of February, 1911, and made, executed and delivered by the Conrad City Water Company to this complainant, the Pacific Coast Pipe Company, in payment for certain pipe and other materials theretofore furnished during the year 1910 by the Pacific Coast Pipe Company to the Conrad City Water Company in the course of the construction of the water plant of the said company at the town of Conrad, and which said pipe and material were used in the construction of the said plant. That after the filing of the complaint in the said action, the plaintiff therein, the complainant herein, filed its affidavit and undertaking on attachment as required by law, and on the 3d day of November, 1913, a writ of attachment was issued in the said action out of this court directed to the marshal of this court commanding him to levy the same upon the property of the Pacific Coast Pipe Company. That thereafter and on the 7th day of November, 1913, the marshal of this court levied the said writ of attachment upon certain property of the

defendant, the Conrad City Water Company, by filing in the office of the county clerk and recorder of Teton County, Montana, a copy of the writ of attachment, together with a notice of attachment [4] describing the property attached, which said property is more particularly set forth and described in a copy of the said notice of attachment so filed in the office of the clerk and recorder of Teton County, attached hereto and made a part hereof marked Exhibit "A." That by reason of the filing of the said writ of attachment this complainant obtained a lien upon the property and rights described in the said notice of attachment.

That thereafter, such proceedings were had in the said action that on the 2d day of July, 1914, this complainant, the Pacific Coast Pipe Company recovered in this court a judgment against the defendant, the Conrad City Water Company, for the sum of Nine Thousand Six Hundred Eighty-nine Dollars and Forty-seven Cents (\$9,689.47), with costs taxed at Seven Hundred Eleven Dollars and Twenty-five Cents (\$711.25), no part of which said sum has been paid. That on the 14th day of April, 1915, this complainant caused to be issued out of this court an execution upon the said judgment directed to the marshal of the District of Montana as in such cases made and provided, but has been unable to have the said execution satisfied out of the property of the Conrad City Water Company by reason of the facts and things hereinafter set forth.

5. That the plant of the Conrad City Water Company was constructed and its property, rights and franchises were acquired pursuant to an agreement

entered into between one Ben Hager and one W. G. Conrad now deceased, whereby the said Conrad was to furnish, or procure to be furnished through companies controlled by him, the necessary moneys and the said Hager was to superintend the work of construction. That the company was to be organized with a capital stock of the par value of One Hundred Thousand Dollars (\$100,000), and an issue of bonds, of which enough was to be sold to return to said Conrad the moneys so advanced by him for construction and the stock and remaining bonds were to [5] be divided between him and the said Hager. That pursuant to the said agreement, Hager appropriated the water and acquired title to the lands referred to in Exhibit "A." That the said Hager also obtained from the Town of Conrad a franchise granted by Ordinance No. 2A passed and approved on the 13th day of November, 1909, granting to Hager and his successors and assigns the right to construct, maintain and operate a gravity system of waterworks with the right to supply the inhabitants of the town, now city of Conrad for a period of Thirty (30) years.

That pursuant to the said agreement the said Ben Hager, together with one Geo. H. Stanton, then the personal attorney of the said W. G. Conrad and acting in his behalf, and one M. S. Darling, then a civil engineer in the employ of the said W. G. Conrad and acting in his behalf, did on the — day of August, 1910, make, acknowledge and file with the Secretary of State of Montana, the article of incorporation of the Conrad City Water Company, one of the defendants herein, with the capital stock of the par value of One Hundred Thousand Dollars (\$100,000),



divided into One Hundred Thousand (100,000) shares, of which twenty (20) shares were subscribed by the incorporators, but for which no consideration was paid.

That after filing the articles of incorporation the incorporators met on the 26th day of August, 1910, and organized the said corporation by the election of Ben Hager, M. S. Darling and M. B. Hager, the son of Ben Hager, Directors. These directors organized by the election of M. B. Hager, President, Ben Hager, Vice-President and M. S. Darling, Secretary. On the same date the stockholders of the Conrad City Water Company, consisting of Ben Hager, M. S. Darling and M. B. Hager, who held only the twenty (20) shares of stock, which had been subscribed for by the incorporators, by resolution accepted the offer of Ben Hager to sell to the company the system of waterworks in the town of [6] Conrad, including all contracts, rights, reservoir sites, reservoirs, pipe-lines, easements, rights of ways, machinery and equipment and all property owned and used by him in the conducting of the business of the said waterworks system, including franchises granted by the town of Conrad to be paid for by the issuance and delivery to the said Ben Hager, as full paid, ninety-nine thousand nine hundred eighty (99,980) shares of the stock of the Conrad City Water Company, being all of the remaining shares of the said company then unsubscribed for, and the promissory note of the company for the sum of Seventy Thousand Dollars (\$70,000), which note was to be secured by Eighty Thousand Dollars (\$80,000) face value of the first mortgage six per

cent (6%) gold bonds of the company to be thereafter issued and negotiated for the corporate purposes of the company by the officers, and authority was conferred upon the officers to carry into effect this resolution. Thereupon there was issued to Ben Hager, ninety-nine thousand nine hundred eighty (99,980) shares of stock and a series of notes aggregating Seventy Thousand Dollars (\$70,000). Thereafter on the 26th day of August, 1910, an issue of Eighty Thousand Dollars (\$80,000) in bonds was executed by the officers of the Conrad City Water Company secured by a deed of trust covering all of the property, rights, etc., of the said company executed by the Conrad City Water Company to the Pondera Valley State Bank, one of the defendants herein, which said deed of trust was recorded on the 14th day of December, 1910, in Book 4B at page 148 in the office of the county clerk and recorder of Teton County. That the entire issue of bonds was delivered to the said Ben Hager as security for the so-called promissory note, and were then delivered by said Hager to the said W. G. Conrad to be sold in accordance with the terms of the agreement which had theretofore been entered into between the said Ben Hager and the said Conrad prior to the organization of the [7] said company. That the entire issue of stock so delivered to Hager was by him delivered to said Conrad as further security for the fulfillment of the terms of said agreement. That at the time of the issuance and delivery of the said bonds and trust deed, the said Conrad City Water Company was not indebted to the said Ben Hager or to the said W. G. Conrad in any sum whatsoever.

That on the 26th day of August, 1910, neither the said Ben Hager nor the said W. G. Conrad had advanced any moneys to the Conrad City Water Company in excess of the sum of Fifty-one Thousand Dollars (\$51,000) which said sum had been advanced by the said W. G. Conrad through the medium of Conrad Brothers, a partnership composed of the said W. G. Conrad and the estate of Charles E. Conrad, which partnership on or about the 13th day of September, 1911, became merged in the defendant, the Conrad Banking Company, a corporation engaged in business at Great Falls, Montana, or through the medium and under the name of the Conrad Townsite Company, a corporation engaged in business at the town of Conrad, or the Pondera Valley State Bank, a corporation engaged in business at the town of Conrad, in all of which said corporations the said W. G. Conrad was a dominant stockholder and officer, and that the moneys so advanced by these corporations were in fact advanced to the said Hager at the direction and upon the credit of the said W. G. Conrad pursuant to the terms of the contract which had previously been entered into between the said Conrad and the said Hager and formed the consideration for the issuance to Hager of the shares of stock of the said company. That the property, rights and franchises conveyed by Hager to the said Water Company was not worth the sum of One Hundred Thousand Dollars (\$100,000), the par value of the stock issued therefor, as Hager, Conrad and the other directors of said water company well knew.



6. That the said Ben Hager as the ostensible manager of the [8] said corporation, but in fact as the employee of W. G. Conrad, took possession of the plant thus transferred to the Conrad City Water Company and proceeded to operate the same. That no further or other meetings of the corporation was held and the directors and officers of the corporation performed no functions whatever, until the 18th day of April, 1914, at which time a meeting of the directors of the corporation was called, at which there were present Ben Hager, M. S. Darling, and M. B. Hager and W. G. Conrad as a stockholder. M. B. Hager resigned from the position of officer and director and H. W. Conrad, who held no shares of stock in the company except qualifying shares transferred to him and for which he paid no consideration, was elected as an officer and director in his place and Ben Hager elected president of the company. That on the said date the said Ben Hager under the direction and control of W. G. Conrad, caused the said directors to pass a resolution directing the president and secretary to execute note covering the moneys advanced for the construction of the waterworks and building the plant as follows: to Conrad Brothers for the sum of \$48,275, to the Conrad Townsite Company for the sum of \$13,930, to the Pondera Valley State Bank, \$5,419, to W. G. Conrad \$850, which said moneys were already represented by the notes theretofore executed and delivered to Hager. The president and secretary were also directed to turn over and deliver to W. G. Conrad as trustee the issue of bonds secured by the said

trust deed to the Pondera Valley State Bank, of the par of Eighty Thousand Dollars (\$80,000) as security for the said notes. That the said Conrad City Water Company was not upon said date indebted to the said several corporations in any amount whatsoever, but that the notes thus executed were but evidences of moneys which had theretofore been advanced through the medium of these several organizations by the said W. G. Conrad for the [9] construction of the said water plant in accordance with his agreement with the said Ben Hager. That the said Ben Hager and the said W. G. Conrad knew, upon the 18th day of April, 1911, at the time of the issuance of the said notes hereinabove referred to that the claim of this complainant was then a valid outstanding obligation of the corporation, as evidenced by the promissory note sued on. That on the said 18th day of April, 1911, the said W. G. Conrad was a dominant stockholder and officer in each of the organizations to which the notes were thus issued and that the said transactions as shown upon the books of the company were fictitious and void as against the claim of this complainant, and were made and had by the said Ben Hager and W. G. Conrad for the purpose of hindering and delaying this complainant in the collection of its said claims.

That this complainant both at the time it delivered the supplies to said Water Company, and at the time it accepted the note in payment therefor had no knowledge or notice of the issuance by said company of the promissory notes or of the delivery of said bonds to Hager.

7. That by means of transactions, the details of which are unknown to complainant, between the defendants, the Pondera Valley State Bank, Conrad Banking Company, and Conrad Trust and Savings Bank, of which corporations W. G. Conrad was at all times a dominant stockholder and officer, the issue of bonds aggregating Eighty Thousand Dollars (\$80,000) has come into the possession of these several companies who are now asserting some claim to them as indebtedness of the Conrad City Water Company prior to the indebtedness of this complainant, by virtue of the trust deed to the Pondera Valley State Bank executed under the resolution of August 26, 1910, but that whatever interests the said corporations, or either of them may have in the said bonds, the interest was acquired by the said corporations respectively at a time when W. [10] G. Conrad was a dominant stockholder and an officer and with full knowledge on the part of the said corporations of the circumstances under which the said bonds were issued and the trust deed delivered, and that the said trust deed and the said issue of bonds is fraudulent and void as to the claim of this complainant under the judgment hereinabove referred to. That the issue of stock of the Water Company has, by means to complainant unknown, come into the hands of some of the defendants, who are now using it to dictate the management of the Water Company.

10. That after the recovery of the judgment hereinabove referred to by this complainant against the Conrad City Water Company, the officers of the Con-



rad City Water Company abandoned their functions and turned the affairs of the company over to the management of the officers in charge of the several defendant corporations hereinabove referred to. That on the —— day of March, 1915, the defendant, the Conrad Mercantile Company, a corporation in which the Conrad interests owned the capital stock, commenced an action in the District Court of the Eighth Judicial District of the State of Montana in and for the county of Teton against the Conrad City Water Company to foreclose a pretended mechanic's lien for the sum of Fifty-four Dollars and Seventy Cents (\$54.70) for supplies and materials furnished to the Water Company between the 1st day of September, 1914, and ending on the 10th day of March, 1915. That the said complaint, in addition to the praying for the foreclosure of the lien, prayed for the appointment of a receiver of the Conrad City Water Company and set forth as the grounds of the said complaint that the Conrad City Water Company was insolvent and its affairs in a chaotic condition and that in order to protect the plaintiff from great loss, damages and detriment, and to enable the company to supply the inhabitants of Conrad with water, it was necessary that a receiver be forthwith [11] appointed to take charge of the assets and property of the said Conrad City Water Company. That upon the same day that the complaint was filed, the Conrad City Water Company appeared and confessed the allegations of the complaint and thereupon the Judge of the District Court of the Eighth Judicial District of the State of Montana in and for

the County of Teton, appointed the defendant James T. Stanford the receiver of all and singular the real and personal property of the Conrad City Water Company. That the said James T. Stanford thus appointed receiver is the president of the defendant, the Conrad Banking Company, and immediately upon his appointment as such receiver, took possession of all of the property, both real and personal of the Conrad City Water Company and now has the same in his possession and under his control, claiming the same by virtue of his appointment as said receiver. That the District Court of the Eighth Judicial District of the State of Montana in and for the county of Teton, had no jurisdiction to appoint the said receiver for the reason that the complaint in the said action did not set forth facts sufficient to confer upon the said court jurisdiction and that the said receivership was but a part and parcel of a scheme entered into by the said James T. Stanford and other officers of the defendant companies to obtain control of the affairs of the said Conrad City Water Company and with the intent to hinder and delay this complainant in satisfying the judgment hereinbefore referred to out of the assets and property of the Conrad City Water Company, properly applicable thereto. That the pretended mechanic's lien upon which said action is based was not filed until March, 1915, and the lien, if valid at all, is subsequent and subject to the lien of complainant upon the property and rights described in Exhibit "A" by virtue of the levy of the writ of attachment issued out of this court in the action in which the judgment

herein sued on was recovered. [12]

11. That the defendant, the Conrad Trust and Savings Bank, is a corporation engaged in the business of banking in the city of Helena, Montana, and the defendant P. B. Bartley is the cashier thereof. That during his lifetime, W. G. Conrad was the president and controlling stockholder thereof. That the said bank, or the said Bartley as trustee therefor, claims to own an interest in the issue of bonds secured by said trust deed and holds some or all of the capital stock of the Water Company, the exact character of which said claims or ownership is to this complainant unknown, but that whatever interest the said bank or the defendant Bartley, as trustee or otherwise, claims in said bonds or stock was acquired at a time when W. G. Conrad was president of said defendant bank and with full knowledge of all of the facts surrounding the issue of said stock and of said bonds, and the delivery thereof to said W. G. Conrad, and with full knowledge of the claim of complainant against the defendant water company.

12. That under and by virtue of the writ of execution heretofore issued out of this court upon the judgment recovered herein notice of garnishment was served on the 20th day of April, 1915, upon the defendant James T. Stanford, who, in answer thereto has stated that under and by virtue of the order duly given, made and rendered by the District Court of the Eighth Judicial District of the State of Montana in and for the county of Teton in the action hereinabove described in paragraph ten, he has taken into his possession all of the property and assets of the



defendant, the Conrad City Water Company and holds the same subject to the orders and directions of said Court and not otherwise for the benefit of the Conrad Mercantile Company and all persons interested in the affairs of the said corporation. That by reason thereof this complainant is unable to enforce the judgment of this Court by process of execution heretofore issued out of this court. That [13] the defendant, the Conrad City Water Company, is a *quasi* public corporation and that all of its property, including the property heretofore levied upon by the writ of attachment issued out of this court is necessary for its successful operation and that the value of the property and plant and water system consists in its being maintained and operated as a single plant and that it is impossible to sell the property levied upon under the writ of execution separate and distinct from the remaining property, rights and franchises of the Conrad City Water Company. That by reason thereof the complainant has no adequate remedy at law.

WHEREFORE, complainant prays as follows:

1. That a writ of subpoena issue out of this court directed to the defendants, the Conrad City Water Company, the Pondera Valley State Bank, the Conrad Banking Company, the Conrad Trust and Savings Bank, the Conrad Mercantile Company, James T. Stanford and Paris B. Bartley, commanding them and each of them, at a certain time, as provided by the rules of this court, to appear before this court and then and there full, true, direct and perfect answers make to all and singular the premises.

2. That each of the said defendants be required to set forth their claim of right to the possession or claim of title to any of the property belonging to the Conrad City Water Company which is subject to the process of this court in satisfaction of the judgment hereinabove described.

3. That an order be entered directed to the defendant, the Conrad City Water Company and the defendant James T. Stanford, requiring them to show cause at a date to be fixed by this Court, why a receiver should not be appointed by this Court to take possession of the property, rights and franchises of the defendant, the Conrad City Water Company, pending this litigation now in the hands of the defendant, James T. Stanford. [14]

4. That upon the final hearing of this cause a decree be entered declaring the trust deed from the Conrad City Water Company to the Pondera Valley State Bank, recorded in Book 4B at page 148 in the office of the county clerk and recorder of Teton County, together with the issue of bonds thereby secured, to be null and void as against the judgment of this complainant and that the judgment of this complainant be declared to be a first lien upon all of the property, rights and franchises of the said Conrad City Water Company and for such other and further relief in the premises as the nature of the circumstances of the case may require.

PACIFIC COAST PIPE COMPANY.

By E. C. DAY and  
THOS. A. MAPES,

Its Solicitors, Helena, Mont. [15]

**Exhibit "A" to Bill in Equity—Notice of Attachment.****NOTICE OF ATTACHMENT.**

Notice is hereby given that the property hereinafter described is attached, pursuant to the writ of attachment filed herewith and made a part hereof. Said property is particularly described as follows, to wit:

The Northeast quarter of the Southeast quarter of Section Eighteen (18) in Township Twenty-eight (28) North of Range Four (4) West of the Principal Montana Meridian, County of Teton, State of Montana; also all rights to the use of the waters of a certain spring known as the "Dipping Tank Spring," situate on the Northwest quarter of the Southeast quarter of Section Eighteen (18) in Township Twenty-eight (28) North, of Range Four (4) West, Teton County Montana, the waters of which Spring flow upon the Southwest quarter of the Northeast of said Section 18, also the use of all the surplus waters of a certain spring known as the "Watering Trough Spring," situate on the Southeast quarter of the Northeast quarter of said Section 18; also an easement or right of way for a water pipe-line through the south half of the northeast quarter of said Section 18; also that certain water-right, notice of which was filed by one Ben Hager for record in the office of the County Clerk and Recorder of Teton County, Montana, on the 17th day of November, 1909, and recorded in 9 B of Water Rights on Page 409, records of said Teton County,



being an appropriation of two cubic feet per second of the waters of a certain spring on or near the northwest quarter of the southeast quarter of said section 18; also the right, title and interest of Ben Hager and Birdie Hager his wife, in and to a certain contract made the 25th day of January, 1910, between Peter DeBoer and the said Ben Hager, by the terms of which said Peter DeBoer agreed to convey to the said Ben Hager his heirs and assigns the right to construct, maintain and use a reservoir situate partially upon the southeast quarter [16] of the southwest quarter and the southwest quarter of the southwest quarter of Section 8, in Township 28, North of Range 2 West, Teton County, Montana, and also a right of way through the Southwest quarter of said section eight, and the east half of the southwest quarter of section 7, in said last-mentioned township and range for a pipe-line to conduct water to the town of Conrad, which said contract is recorded in Book 5A of Miscellaneous at Page 318, records of said Teton County; also all of the east thirty feet of Lots Numbered 26, 27, and 28 in Block Numbered 4, of the Original Townsite of Conrad, in the County of Teton and State of Montana, according to the official plat thereof on file in the office of the Clerk and Recorder of Teton County, Montana.

\_\_\_\_\_,  
United States Marshal,

By \_\_\_\_\_,

Deputy.

Filed May 14, 1915. Geo. W. Sproule, Clerk.

Thereafter, on June 26, 1915, the Answer of defendants, Conrad City Water Co. et al., was duly filed herein, being in the words and figures following, to wit: [18]

(Title of Court and Cause.)

**Answer.**

Answer of Conrad City Water Company, a Corporation; Pondera Valley State Bank, a Corporation; Conrad Banking Company, a Corporation; Conrad Trust and Savings Bank, a Corporation; Conrad Mercantile Company, a Corporation, and Paris B. Bartley, Trustee.

Now come the defendants, Conrad City Water Company, Pondera Valley State Bank, Conrad Banking Company, Conrad Trust and Savings Bank, Conrad Mercantile Company, and Paris B. Bartley, Trustee, and for answer to the bill of complaint in the above-entitled cause admit, deny and allege as follows:

1. Admit the allegations of paragraphs 1, 2 and 3 of the bill of complaint.

2. Admit the allegations of paragraph 4 of the bill of complaint, except that these answering defendants deny that by reason of the filing of the writ of attachment the complainant obtained a lien upon the property and rights [19] described in the attachment that was prior or paramount to the lien theretofore existing against said property by virtue of the deed of trust described in the bill of complaint, and deny that the complainant has taken

the necessary or proper steps to have the execution issued by it satisfied out of the property of the Conrad City Water Company, and allege the fact to be that the execution in said case has not been returned *nulla bona* until long after the filing of said bill of complaint herein and the said complainant has not exhausted its rights or remedies as provided by law, nor has it levied upon, sold or attempted to sell any of the property belonging to the Conrad City Water Company or to satisfy the execution heretofore issued in said case.

3. As to the allegations of Paragraph 5, these answering defendants deny that the Conrad City Water Company issued its promissory note for the sum of \$70,000, or a series of notes aggregating \$70,000, or delivered the same to one Ben Hager, and deny that the issue of \$80,000 of bonds were delivered to the said Ben Hager as security for the said promissory note of \$70,000, and deny that at the time of the issuance and delivery of the bonds and trust deed the Conrad City Water Company was not indebted to Ben Hager or to the said W. G. Conrad in any sum whatever, and deny that on the 26th day of August, 1910, that Ben Hager or the said W. G. Conrad had not advanced any moneys to the Conrad City Water Company in excess of the sum of \$51,000, and deny that the partnership composed of W. G. Conrad and the estate of Charles E. Conrad ever, at any time or at all, became merged in the defendant, Conrad Banking Company, or through the medium or under the name of the Conrad Townsite Company, or the Pondera Valley State



Bank, and deny that the moneys advanced for the building of said plant formed the consideration for the issuance to Ben Hager of shares of stock of the Conrad City Water Company, and deny [20] that the property rights or franchises conveyed by the said Ben Hager to the Conrad City Water Company were not worth the sum of \$100,000, or that the said Ben Hager or W. G. Conrad, or any of the other directors of the Conrad City Water Company, knew the same were not worth the said sum of \$100,000, and deny that there was no consideration paid for the twenty shares of stock subscribed by the incorporators, but allege the fact to be that the said Ben Hager obtained the franchise from the town of Conrad for constructing, maintaining and operating a system of waterworks, with the right to supply the inhabitants of the town of Conrad for the period of thirty years, and sold said franchise together with a water right, together with a reservoir, use and rights of way for a pipe-line in conducting said water to and through the town of Conrad, together with other rights and claims, to the defendant, Conrad City Water Company for the consideration of 99,980 shares of the capital stock of said company.

4. And these answering defendants further allege the facts to be that there was advanced in the construction and building of said plant of the Conrad City Water Company the following sums of money by the following named persons: By Conrad Brothers the sum of \$48,275; by Conrad Townsite Company the sum of \$13,930; by Pondera Valley State Bank \$5,419; by W. G. Conrad \$850, which said

moneys so advanced were actually used and employed in the construction, building and equipment of the plant of the Conrad City Water Company, and that the sums so advanced as above mentioned were, by resolution of the Board of Directors of the Conrad City Water Company, evidenced by the promissory notes of the Conrad City Water Company, duly and regularly issued and delivered, and that the said promissory notes for said amounts to the above-named respective parties were, by resolution of [21] the Board of Directors of the Conrad City Water Company secured by the pledge of \$80,000 of first mortgage bonds of the said Conrad City Water Company, which said mortgage bonds were secured by the deed of trust referred to in the bill of complaint duly and regularly executed by the Conrad City Water Company and recorded on the 14th day of December, 1910, in Book 4B, at page 148, in the office of the county clerk and recorder of Teton County, Montana.

5. That the said notes of the Conrad City Water Company to the respective parties so mentioned as above described became due and were unpaid. That the \$80,000 of bonds secured by the said trust deed so pledged as security for said notes were duly and regularly sold in accordance with the statute in such case made and provided with reference to the sale of collateral so pledged, and the same were bid in at public auction by the answering defendant, Paris B. Bartley, Trustee, for the use and benefit of the parties to whom the Conrad City Water Company executed its notes and secured the same by the

pledge of said bonds secured by said trust deed.

6. That the corporation, Conrad City Water Company, named as defendant herein, did not execute any note to the complainant, nor did it at any time secure the complainant on any note it may have held by any pledge of bonds, nor was any indebtedness of the complainant in any way secured by the deed of trust above referred to.

7. These answering defendants further allege the facts to be that pursuant to the deed of trust the aforesaid creditors of the Conrad City Water Company, whose claims were thus secured by the deed of trust, required this answering defendant, the Pondera Valley State Bank, as trustee under said deed of trust, to institute foreclosure of said deed of trust in the District Court of the Eighth Judicial District [22] of the State of Montana, in and for the county of Teton, in which said county of Teton the said property described in said deed of trust is situated, the same being the proper place for the foreclosure of said mortgage. That the said Conrad City Water Company had defaulted in the payment of interest upon said bonds secured by the said deed of trust, and under and by virtue of the terms of said deed of trust the whole of the principal and interest then became due and payable.

8. That the District Court of the Eighth Judicial District of the State of Montana, in and for the county of Teton, being a court of competent jurisdiction, and the proper and only place for the foreclosure of said mortgage, having jurisdiction of the subject matter and the parties defendant, including



the complainant, did heretofore, by virtue of the deed of trust, and under the statutes of the State of Montana, duly and regularly appoint the defendant, James T. Stanford, Receiver of the Conrad City Water Company, and the said defendant, James T. Stanford, as said receiver, is now in the possession and entitled to the possession of all and singular the property, rights and franchises of the defendant, Conrad City Water Company, and that said action is now pending and undetermined; that in the aforesaid action for the foreclosure of the trust deed so commenced in the said county of Teton, where said property is situated, and in which said action the complainant, the Pacific Coast Pipe Company, is a party defendant, the validity of said bonds and the trust deed can and will be fully and completely determined and tested.

9. Admit that W. G. Conrad was a stockholder and officer in some of the corporations that advanced money to the Conrad City Water Company, but was not a stockholder, and never had any interest in this answering defendant, the Conrad Mercantile Company, and allege the fact to be that the said [23] W. G. Conrad was only one member of the Board of Directors of said corporation that advanced money to the Conrad City Water Company, and that each of said corporations were controlled by its Board of Directors.

10. Deny that the moneys so advanced by the aforesaid corporations were advanced to the said Ben Hager at the direction or upon the credit of the said W. G. Conrad, and deny that the moneys so ad-

vanced formed the consideration for the issuance to the said Ben Hager of the shares of stock of the said Conrad City Water Company, but allege the fact to be that the said moneys so advanced were advanced upon the faith and credit of the Conrad City Water Company and its property, franchises and rights.

11. Deny that the said Ben Hager was in the employ of the said W. G. Conrad, or as such employee took possession of the plant of the Conrad City Water Company or appropriated the same as such. Deny that on the 18th day of April, 1911, or at any other time or at all, Ben Hager, under the direction or control of W. G. Conrad, caused any resolution of the Board of Directors to be passed, but allege the facts to be that the resolutions so passed were duly and regularly passed by the Board of Directors of the Conrad City Water Company for the execution of the notes in the amounts and to the parties above named and secured by the aforesaid bonds and deed of trust.

12. Deny that the moneys advanced to the Conrad City Water Company by Conrad Brothers, Conrad Townsite Company, Pondera Valley State Bank and W. G. Conrad, as hereinabove set out, were already represented by notes heretofore executed and delivered to the said Ben Hager.

13. Deny that the Conrad City Water Company was not on the 18th day of April, 1911, indebted to Conrad Brothers, Conrad Townsite Company, Pondera Valley State Bank [24] and W. G. Conrad in the amounts above set out, and deny that the notes thus executed were evidence of the moneys

which had theretofore been advanced through the medium of the several organizations by the said W. G. Conrad, as alleged in the bill of complaint.

14. Deny that the said Ben Hager or the said W. G. Conrad knew, on the 18th day of April, 1911, or at any other time or at all, or the time of the issuance of the aforesaid notes, that the claim of the complainant was a valid, outstanding obligation of the Conrad City Water Company or evidenced by the promissory note sued on, and deny that any transactions of the Conrad City Water Company were fictitious or void as against the claim of the complainant, or were made or had by the said Ben Hager or W. G. Conrad for the purpose of hindering or delaying the complainant in the collection of its claims.

15. Deny that the complainant at the time it delivered the supplies to the Water Company, or at the time it accepted any note therefor, had no knowledge or notice of the issuance by the Conrad City Water Company of the promissory notes or of the delivery of said bonds and the trust deed therefor, and allege the fact to be that said trust deed was duly and regularly recorded in the office of the county clerk and recorder of Teton County, Montana, on the 14th day of December, 1910, in Book 4B, at page 148, which was long prior to the execution and delivery of the note sued upon by complainant. That by reason of the recording of said mortgage the complainant had notice and was charged with notice of the record thereof and all therein contained.

16. Admit that the issuance of bonds aggregating \$80,000, secured by the aforesaid trust deed, came



into the possession of the parties to whom they were so pledged, [25] as above set forth, and that these answering defendants, excepting the Conrad Mercantile Company and Conrad Banking Company are now asserting claim to the same as an indebtedness to the Conrad City Water Company, which is prior and paramount to any indebtedness of the complainant, and that the right, title and interest of the aforesaid parties were acquired in and to the said bonds and trust deed in the manner as above set out.

17. Deny that the said trust deed and the said issuance of bonds is fraudulent or void as to claim of the complainant under the judgment referred to in the bill of complaint, or in any other manner or at all, but that the same are valid, legitimate, outstanding obligations of the Conrad City Water Company so secured by the trust deed, all of which are prior, paramount and superior to any claim of the complainant.

18. Deny that these answering defendants, or either of them, are using the stock of the Conrad City Water Company to dictate the management of the same.

19. Deny that the officers of the Conrad City Water Company have abandoned their functions or turned the affairs of the company over to the management of the officers of the parties mentioned in the bill of complaint.

20. Deny that the capital stock of this answering defendant, Conrad Mercantile Company, is owned by the Conrad interests.

21. Admit that this answering defendant, the Con-

rad Mercantile Company, commenced an action in the District Court of the Eighth Judicial District of the State of Montana, in and for the county of Teton, against the Conrad City Water Company, to foreclose the valid, subsisting and legitimate mechanic's lien; that the said lien was not a pretended lien; said case being No. 1407 on the files of said court.

22. That the aforesaid suit was commenced in the [26] District Court of the Eighth Judicial District of the State of Montana, in and for the county of Teton, on the 16th day of March, 1915, and prior to the commencement of this action or the filing of this bill of complaint by the complainant. That said District Court of Teton County, having full and complete jurisdiction of the subject matter and of the defendant, Conrad City Water Company, and all of its property, rights and franchises, assumed jurisdiction of said action and now has, and still maintains, jurisdiction thereof. That summons was duly issued in said action and duly served upon the Conrad City Water Company, and the said Conrad City Water Company appeared in said action. That said complainant, in addition to praying for a foreclosure of said lien, alleged and set forth that the Conrad City Water Company was a public service corporation, engaged in furnishing water supply for the city of Conrad, a municipal corporation, and various taxpayers of said city and Teton County residing therein, each of whom must receive water from the mains of said Conrad City Water Company in order to protect their property and prevent it from loss and destruction by fire, and that said defendant

corporation, Conrad City Water Company, was financially unable to continue operating its said plant, or even to maintain the same and protect it from depreciation or being materially injured, and that the appointment of a receiver for said Conrad City Water Company forthwith was an imperative necessity. That said Conrad City Water Company was then insolvent and had admitted that the appointment of a receiver for its affairs was for the best interests of all parties concerned, and that the property subject to the lien of the Conrad Mercantile Company was then in imminent danger of being lost, materially injured, depreciated in value and rendered valueless to the Conrad Mercantile Company and all parties interested in the affairs of the Conrad City Water Company unless the receiver was forthwith appointed. [27] That thereupon and thereafter such proceedings were had and taken before said Court in said cause No. 1407; that on March 16th, 1915, an order was duly given, rendered and made by said District Court of the Eighth Judicial District of the State of Montana, in and for the county of Teton, wherein and whereby James T. Stanford was duly appointed receiver of all and singular the real and personal property and assets of the Conrad City Water Company, a copy of which order is hereto attached, and made a part hereof and marked Exhibit "A." That the said James T. Stanford thereupon duly qualified as such receiver by subscribing and filing in said court and cause his oath of office and also filing his official bonds, duly signed by good and sufficient sureties and approved by said court



in all respects as directed by said order marked Exhibit "A," and the said James T. Stanford entered upon the discharge of his duties as such receiver and took possession of all the property and assets of the Conrad City Water Company as receiver and officer of said court for the benefit of all parties interested in the affairs of said Conrad City Water Company, including this complainant.

23. That at all times since so qualifying as receiver of said Conrad City Water Company on March 16th, 1915, and taking possession of the assets of the Conrad City Water Company, the said James T. Stanford has continued to act as such receiver and to administer the affairs of said corporation as an officer of said court.

24. Deny that the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, had no jurisdiction to appoint the said receiver, and deny that the complaint in said action did not set forth facts sufficient to confer jurisdiction upon the said court, and deny that the receivership was a part or parcel of a scheme entered into by the defendant, James T. Stanford, [28] or other officer of the defendant companies to obtain control of the affairs of the Conrad City Water Company, or with the intent to hinder or delay the complainant in satisfying its judgment out of the assets or property of the Conrad City Water Company.

25. Admit that the Conrad Trust and Savings Bank claims to own an interest in the issue of bonds secured by the trust deed by reason of certain moneys paid, laid out and advanced and loaned to

the Conrad City Water Company, as evidenced by the promissory note of said Water Company, and that the defendant, Paris B. Bartley, Trustee, was acting as such and representing this answering defendant, the Conrad Trust and Savings Bank, in the purchase of said bonds at pledgee's sale as well as 99,980 shares of the capital stock of said Water Company, and that the claim of this answering defendant, Conrad Trust and Savings Bank, by virtue of the pledge of said stock so secured by the trust deed and the sale thereof, has a prior and paramount claim to that of the complainant, and that the said Conrad Trust and Savings Bank acquired said security in good faith and for money actually advanced and loaned to the Conrad City Water Company.

26. These answering defendants deny that any of said issue of bonds of the Conrad City Water Company, secured by said trust deed to the Pondera Valley State Bank as Trustee, ever came into the possession or under the control of the defendant, Conrad Banking Company. Deny that the Conrad Banking Company is now asserting, or ever or at all asserted, any claim to any of said bonds or any interest therein, and allege the fact to be that the Conrad Banking Company never had any business dealings, relation or transaction whatever with the Conrad City Water Company, and never at any time or at all, made any claim to or upon any part or portion of the property or assets of said Conrad City Water Company, or any [29] shares of stock, bonds or other evidence of indebtedness issued

by and for the use or benefit of said Conrad City Water Company, and said Conrad Banking Company never had any interest whatsoever in any of the matters and things set out in complainant's bill of complaint, and accordingly is not now, and never was, a proper party defendant or a party in anywise interested in this cause, and said Conrad Banking Company has been improperly joined in said bill of complaint.

27. Admit that the complainant issued a writ of execution out of this court and cause a notice of garnishment to be served upon the defendant, James T. Stanford, as receiver, but deny that the execution has been returned *nulla bona*, prior to the filing of this bill of complaint, or that the return thereon shows that there is no property, rights or franchises of the Conrad City Water Company out of which the judgment of the complainant can be satisfied. These answering defendants further allege the fact to be that the complainant has failed, neglected and refused to levy its writ of execution upon its judgment upon the property, rights and franchises of the Conrad City Water Company and to sell, or offer to sell, or advertise the same for sale, or in any other way than as stated to enforce its judgment, and deny that the complainant has no adequate remedy at law.

28. That heretofore this defendant, Pondera Valley State Bank, duly commenced its certain action in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, the same being Cause No. 1486, on



files of said court, wherein the Pondera Valley State Bank, as Trustee, is named as plaintiff, Conrad City Water Company, Conrad Mercantile Company and the complaint, Pacific Coast Pipe Company are named as defendants, for the purpose of foreclosing that certain deed of trust executed August 26, 1910, and recorded in Book 4B, page 148, and thereupon summons was duly issued out of and under the [30] seal of said court in said action No. 1486, and duly served upon the defendant, Conrad City Water Company. That said Conrad City Water Company duly appeared in said action and thereupon and thereafter such proceedings were had and taken before said Court in said cause No. 1486. That on June 23, 1915, an order was duly given, rendered and made by said District Court in said cause wherein and whereby the appointment of a receiver of the Conrad City Water Company made by said Court on March 16th, 1915, in said Cause No. 1407, on the files of said last mentioned court, was extended to said Cause No. 1486, and the said James T. Stanford was designated and appointed as receiver of all and singular the property, real, personal and all equitable interests, contracts, things in action, effects, moneys, receipts, earnings, rights, privileges, franchises and immunities, wheresoever situate, held or possessed by this defendant, Conrad City Water Company, a copy of which last mentioned order is hereto annexed, made a part hereof and marked Exhibit "B." That the said James T. Stanford has duly complied with all the terms and conditions of said last mentioned order.

29. That thereafter, on June 23, 1915, the said Pondera Valley State Bank, after leave of Court first had and obtained from the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, duly filed in said Cause No. 1407, on the files of said last mentioned court, its complaint in intervention, claiming a lien upon all the assets and property of this answering defendant prior and superior to the lien of the Conrad Mercantile Company by virtue of the aforesaid mortgage or deed of trust, and thereupon and thereafter such proceedings were had and taken in said Cause No. 1407; that on June 23, 1915, by an order duly given, rendered and made in said last mentioned cause, the aforesaid appointment of James [31] T. Stanford as receiver of the property, assets and effects of this answering defendant was extended to Cause No. 1486, on the files of said court, a copy of which last-mentioned order is hereto annexed, made a part hereof and marked Exhibit "C."

30. Defendants allege that under and by virtue of the aforesaid orders the District Court of the Eighth Judicial District of the State of Montana, in and for the county of Teton, has acquired possession and full, complete and exclusive jurisdiction of all the affairs and assets of the Conrad City Water Company, an insolvent public service corporation, and that in said court and cause Nos. 1407 and 1486 said complainant is now afforded, and at all times since the institution of said actions, has been afforded, an ample and complete opportunity to assert and protect any and all right or lien which com-

plainant may have upon any of the assets of the Conrad City Water Company.

31. Defendants further allege that this action should abate for the reason that complainant has instituted this cause without presenting its alleged claim to the receiver of the Conrad City Water Company, or the Court having jurisdiction of the affairs of the Conrad City Water Company, and without making any application to the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, for permission to institute or file this bill in equity, or to maintain any proceedings against the Conrad City Water Company or its receiver, and by reason thereof complainant is estopped to maintain this action.

32. Defendants deny each and every allegation in said bill of complaint not herein specifically admitted or denied.

WHEREFORE, these answering defendants pray that the complainant's bill of complaint be dismissed, and that the [32] complainant take nothing thereunder, and that these answering defendants go hence without *day* with their just costs in this behalf incurred.

CONRAD CITY WATER CO.,

By M. S. DARLING,

President.

PONDERA VALLEY STATE BANK,

CONRAD TRUST & SAVINGS BANK,

CONRAD MERCANTILE COMPANY and

PARIS B. BARTLEY, Trustee,

By O. W. McCONNELL,

Their Solicitor.



CONRAD CITY WATER COMPANY and  
CONRAD BANKING COMPANY,By J. A. McDONOUGH,  
Their Solicitor.

O. W. McCONNELL,

Solicitor for Pondera Valley State Bank, Conrad  
Trust and Savings Bank, Conrad Mercantile  
Company, and Paris B. Bartley, Trustee.

J. A. McDONOUGH,

Solicitor for Conrad City Water Company and Con-  
rad Banking Company.Service of the foregoing answer and receipt of  
copy accepted this 26th day of June, 1915.

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Solicitors for Complainant, [33]

State of Montana,

County of Lewis and Clerk,—ss.

M. S. Darling, being first duly sworn according to law, deposes and says: That he is president of the Conrad City Water Company, a Montana corporation, named as one of the defendants in the above-entitled action, and as such is well acquainted with its business and affairs; that he has read the foregoing answer and knows the contents thereof and that the same is true to the knowledge of deponent.

M. S. DARLING,

Subscribed and sworn to before me this 26th day  
of June, 1915.

[Notarial Seal]

O. W. McCONNELL,  
Notary Public for the State of Montana, Residing at  
Helena, Montana.

My commission expires August 14, 1915. [34]

**Exhibit "A"—Order Appointing Receiver in Conrad  
Mercantile Co. v. Conrad City Water Co.**

*In the District Court of the Eighth Judicial District  
of the State of Montana, in and for the County  
of Teton.*

CONRAD MERCANTILE COMPANY, a Cor-  
poration,

Plaintiff,

vs.

CONRAD CITY WATER COMPANY, a Corpora-  
tion,

Defendant.

The plaintiff in the above-entitled action having filed its duly verified Complaint herein with the clerk of this court wherein plaintiff applied to the Court for the Appointment of a Receiver of the Property and Assets of the defendant corporation, the defendant corporation having been served with process and having entered its appearance herein, the Court having examined said verified complaint and also having examined the plaintiff under oath, it appears to the Court and the Court finds that an appearance has been entered in behalf of said company that plaintiff claims a valid subsisting lien upon all the assets and property of defendant corporation; that said corporation is insolvent and has admitted that plaintiff is entitled to have a Receiver appointed upon the testimony produced before this Court and that the appointment of a Receiver is for the best interests of all parties concerned that the

property subject to plaintiff's lien is in imminent danger of being lost, materially injured, depreciated in value and rendered practically [35] valueless to plaintiff and all parties interested in the affairs of said corporation unless a Receiver is forthwith appointed. That defendant is a public service corporation engaged in furnishing water supply for the City of Conrad, a municipal corporation and various tax payers of said city and Teton County residing therein, each of whom must receive water from the mains of said corporation in order to protect their property and prevent its great loss and destruction and that said defendant corporation is financially unable to continue operating its said water plant or even to maintain the same or protect it from depreciating or being materially injured, and that the appointment of a receiver for said corporation forthwith is an imperative necessity, the Court finding that all the allegations of plaintiff's verified complaint are sustained by evidence produced before said Court all and singular the law and the premises being by the Court fully understood and duly considered, IT IS HEREBY ORDERED, That, James T. Stanford, be and he is hereby appointed receiver of this court of all and singular the property, real, personal and all equitable interests, contracts, effects, moneys, receipts, earnings, rights, privileges, franchises and immunities of said defendant corporation, wheresoever situate and the Court hereby ORDERS, EMPOWERS AND DIRECTS that said receiver to take charge of said property and the income thereof as the officer of this court and to



have, hold and manage the same as such receiver and under the orders and directions of this Court for the benefit of plaintiff as well as the other shareholders and creditors of said corporation.

That said receiver is hereby authorized and directed to take immediate possession of all and singular the said property and assets of defendant corporation wheresoever found or situate [36] and subject to the orders and directions of this Court, to continue and conduct systematically the business and operations heretofore conducted by defendant and particularly to preserve, maintain and operate the waterworks and water supply system of said defendant and to that end to do any and all such repair and construction work as may be reasonably necessary to preserve, complete and continue the operation of said waterworks and water service system of the defendant.

The defendant and each of its officers, directors, agents, engineers, engineering forces and employees are hereby required and commanded forthwith to turn over and deliver to said receiver or his duly constituted representative all of the said property and all books of account, vouchers, papers, deeds, contracts, bills, notes, accounts, moneys and other property of the defendant and they are commanded and required to obey and conform to such orders as may be given from time to time by said receiver or his duly constituted representative in thus preserving, maintaining, completing and operating the said water service system and works of the defendant.

IT IS FURTHER ORDERED that the said re-

ceiver be and he is hereby required and directed pursuant to the provisions of Section 6702 of the Revised Codes of Montana, to forthwith duly file in this Court after approval a bond or undertaking in the sum of Ten Thousand (\$10,000.00) Dollars to the State of Montana and Conrad City Water Company, conditioned upon the faithful discharge of his duties as receiver in this action and further conditioned upon his obeying the orders of the Court herein, and IT IS FURTHER ORDERED that in addition to the aforesaid bond said receiver within ten days from this date shall execute an additional bond to be approved by this Court in the sum of Fifty Thousand (\$50,000.00) [37] Dollars.

ORDER, made and entered in open court this 16th day of March, 1915.

H. H. EWING,  
Judge. [38]

**Exhibit "B"—Order Appointing Receiver in Pondera Valley State Bank v. Conrad City Water Co. et al.**

*In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton.*

PONDERA VALLEY STATE BANK, a Corporation,  
as Trustee,

Plaintiff,

vs.

CONRAD CITY WATER COMPANY, a Corporation,  
CONRAD MERCANTILE COMPANY, a Corporation,  
PACIFIC COAST PIPE COMPANY, a Corporation,

Defendants.

Upon reading and filing the verified Complaint in this cause, the defendant corporation, Conrad City Water Company, having been served with process and having entered its appearance herein and having by its verified appearance admitted and confessed that plaintiff corporation has a valid first mortgage lien upon the property of defendant corporation as set forth in its Complaint on file herein that the condition of said mortgage or deed of trust creating said mortgage lien has not been performed and that the property is insufficient to discharge said mortgage debt and the defendant corporation having also admitted that the appointment of a receiver is necessary to protect the lien of plaintiff and serve the best interests of all parties concerned in the affairs of said corporation both as shareholders, bondholders and general creditors, and the Court finding from the testimony produced, that it is for the best interests of all [39] parties concerned that the property and affairs of Conrad City Water Company be in the hands of a receiver and that the property subject to plaintiff's lien is in imminent danger of being lost, materially depreciated in value and rendered practically valueless to plaintiff and all parties interested in the affairs of Conrad City Water Company unless said affairs are intrusted to a receiver. That defendant is a public service corporation engaged in furnishing water supply for the City of Conrad, a municipal corporation, and various tax payers of said city and Teton County residing therein, each of whom must receive water from the mains of said corporation in order



to protect their property and prevent its great loss and destruction and that said defendant corporation is financially unable to continue operating its said water plant or even to maintain the same or protect it from depreciating or being materially injured unless the affairs of said corporation are administered by a receiver of this court and that the administration of the affairs of Conrad City Water Company by a receiver is an imperative necessity, the Court finding that all the allegations of plaintiff's verified complaint are sustained by evidence produced before said Court all and singular the law and the premises being by the Court fully understood and duly considered, **IT IS HEREBY ORDERED** that the appointment of the receiver of Conrad City Water Company heretofore made by this court on March 16th, 1915, in the cause wherein Conrad Mercantile Company is plaintiff, and Conrad City Water Company, defendant, No. 1407 on the files of this court, is hereby extended to this present case and **IT IS HEREBY ORDERED** that James T. Stanford be and he is hereby appointed receiver of this court of all and singular the property real, personal and all equitable interests, contracts, things in action, effects, moneys, receipts, earnings, rights, [40] privileges, franchises and immunities, where-soever situated, held or possessed by the defendant, Conrad City Water Company, described in the complaint herein as subject to that certain mortgage or deed of trust dated August 26th, 1910, made by defendant Conrad City Water Company to plaintiff as trustee for the foreclosure of which this suit is

brought, TO HAVE AND TO HOLD, the same as the officer of this court and under the order and direction of this Court, and the Court hereby ORDERS, EMPOWERS AND DIRECTS the said receiver to take charge of said property and the income thereof as the officer of this Court and TO HAVE, HOLD AND MANAGE, the same as such receiver and under the orders and directions of this Court for the benefit of plaintiff as well as the other shareholders and creditors of said corporation.

That said receiver is hereby authorized and directed to take immediate possession of all and singular the said property and assets of defendant corporation wheresoever found or situated and subject to the orders and directions of this Court, to continue and conduct systematically the business and operations heretofore conducted by Conrad City Water Company and particularly to preserve, maintain and operate the waterworks and water supply system of said defendant and to that end to do any and all such repair and construction work as may be reasonably necessary to preserve, complete and continue the operation of said waterworks and water service system of said Conrad City Water Company.

The defendant, Conrad City Water Company and each of its officers, directors, agents, engineers, engineering forces and employees are hereby required and commanded forthwith to turn over and deliver to said receiver or his duly constituted representative all of the said property and all books of account, [41] vouchers, papers, deeds, contracts, bills, notes, accounts, moneys and other property of the defend-

ant subject to the lien of said mortgage, in its or their hands or under its or their control and they are commanded and required to obey and conform to such orders as may be given from time to time by said receiver or his duly constituted representative in thus preserving, maintaining, completing and operating the said water service system and works of the defendant, and in conducting its said operations and business, and all other persons and corporations whomsoever are hereby enjoined from interfering in any manner whatsoever with the possession, conduct or management of any part of the business or properties over which said receiver is so appointed, or from in any way preventing or seeking to prevent the discharge of such receiver of his duties in the operation of the properties and business hereby committed to his charge.

The defendant and all of its creditors, and all other persons or corporations whomsoever, are hereby enjoined and prohibited from interfering with or intermeddling with, incumbering, transferring or disposing of any of the said properties in any way, except to transfer, convey and turn over the same to said receiver.

The said receiver is hereby invested with full power, at his discretion, to employ and discharge, and fix and pay the compensation of all such counsel, managers, agents and employees, as may be required for the proper discharge of the duties of his trust, and to pay all current expenses incident to the creation or administration of this trust, and to the operation of the properties and business hereby entrusted to him.



That said receiver is hereby fully authorized to collect by suit or otherwise, and receive all income from the said properties, and all debts due to the defendant, of every [42] kind, and to institute and prosecute all such suits as he may determine necessary to recover and preserve the property and trust hereby vested in, and to defend all actions instituted against him as such receiver, and to appear in and conduct the prosecution of defense of any suits against the defendant, and to employ counsel for such purposes.

The said receiver is hereby authorized and directed out of the moneys coming into his hands to pay and discharge all wages due to employees upon the current pay-roll.

IT IS FURTHER ORDERED, that the said receiver be and he is hereby required and directed pursuant to the provisions of Section 6702 of the Revised Codes of Montana, to forthwith duly file in this court, after approval, a bond or undertaking in the sum of Ten Thousand (\$10,000.00) Dollars to the State of Montana, and Conrad City Water Company conditioned upon the faithful discharge of his duties as receiver in this action and further conditioned upon his obeying the orders of the court herein, and IT IS FURTHER ORDERED, that in addition to the aforesaid bond said receiver within ten days from this date shall execute an additional bond to be approved by this court in the sum of Thirty Thousand (\$30,000.00) Dollars.

ORDER, made and entered in open court this 23d day of June, 1915.

H. H. EWING.

Judge. [43]

**Exhibit "C"—Order Appointing Receiver in Conrad Mercantile Co. v. Pondera Valley State Bank, etc.**

*In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton.*

CONRAD MERCANTILE COMPANY, a Corporation,

Plaintiff,

vs.

PONDERA VALLEY STATE BANK, Trustee,  
Intervenor; CONRAD CITY WATER COMPANY, a Corporation,

Defendants.

Upon reading and filing the Complaint in Intervention filed in the above-entitled action, upon Motion of Counsel for Pondera Valley State Bank, and the Court finding from the testimony produced that it is for the best interests of all parties concerned that the property and affairs of Conrad City Water Company be in the hands of a receiver, and that Conrad City Water Company is insolvent and financially unable to continue operating its said water plant or even to maintain the same or protect it from depreciating or being materially injured unless the affairs of said corporation are administered by a

receiver of this Court and that the administration of the affairs of Conrad City Water Company by a receiver is an imperative necessity, and the Court finding that all the allegations of said complaint in intervention are sustained by evidence produced before said Court and the Court finding further that said Pondera Valley State Bank, as trustee, has instituted an action against the said Conrad City [44] Water Company et al., known and numbered as Case No. 1486 on the files of this court, seeking to foreclose that certain mortgage or Deed of Trust heretofore executed by Conrad City Water Company to said Pondera Valley State Bank and praying for the appointment of a receiver in said last-mentioned action and all and singular the law and the premises being by the Court fully understood and duly considered;

IT IS HEREBY ORDERED, that the appointment of a receiver of the Conrad City Water Company heretofore made by this court on March 16th, 1915, in the above-entitled action be and the same is hereby extended to that certain action known as No. 1486, on the files of this court wherein Pondera Valley State Bank, as Trustee, a corporation, is named as plaintiff, and Conrad City Water Company, a corporation, Conrad Mercantile Company, a corporation, and Pacific Coast Pipe Company, a corporation, are named as defendants.

ORDER, made and entered in open court this 23d day of June, 1915,

H. H. EWING,  
Judge.



Filed June 26, 1915. Geo. W. Sproule, Clerk.  
[45]

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Thereafter, on August 25, 1915, the Answer of defendant James T. Stanford, receiver of Conrad City Water Company, was duly filed herein, which Answer is omitted in this transcript pursuant to the direction contained in appellant's praecipe for transcript filed herein and a copy of which is hereinafter set forth. [46]

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Thereafter, on November 1, 1916, Decree was duly filed and entered herein, being in the words and figures following, to wit:

[Title of Court and Cause.]

#### **Decree.**

This cause came on regularly for trial on the 24th day of April, 1916, before the Hon. Geo. M. Bourquin, District Judge, presiding; Day & Mapes, Esqs., appearing as counsel for the complainant, and O. W. McConnell and J. A. McDonough, Esqs., appearing as counsel for defendants. Whereupon witnesses were sworn and examined on the part of the complainant and on the part of the defendants, and the evidence being closed, the cause was submitted to the Court for consideration and decision, and, after due deliberation thereon, the Court finds that it is without jurisdiction in this case and orders a decree entered in favor of the defendants.

Wherefore, by reason of the law and the finding aforesaid, it is ORDERED, ADJUDGED and DE-

CREED that the [47] complainant's bill of complaint be dismissed; that it take nothing thereby, and that the defendants recover of and from the complainant their costs and disbursements taxed at the sum of \$111.50.

Signed and rendered this 1st day of Nov., 1916.

BOURQUIN,  
District Judge.

Filed and entered Nov. 1, 1916. Geo. W. Sproule,  
Clerk. [48]

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Thereafter, on the 24th day of January, 1917, the Statement of the Evidence and Proceedings in said cause was duly approved and filed, being in the words and figures following, to wit: [49]  
(Title of Court and Cause.)

#### **Statement of Case.**

BE IT REMEMBERED, that this case came on regularly for hearing before the Hon. GEORGE M. BOURQUIN, Judge of the District Court of the United States, District of Montana, the plaintiff appearing by its attorneys, Messrs. Day & Mapes, and the defendants by their attorneys, Messrs. O. W. McConnell and J. A. McDonough.

Thereupon the following proceedings were had:

The plaintiff called MARK S. DARLING, who being first duly sworn, testified on direct examination, as follows:

#### **Testimony of Mark S. Darling, for Plaintiff.**

"I reside at Conrad, Montana, and resided there during the years 1910, 1911, 1912. I was secretary

(Testimony of Mark S. Darling.)

of the corporation known as the Conrad City Water Company, and have in my possession the minute-books of the company. The company was incorporated in August, 1910, by Ben Hager, George H. Stanton, and M. S. Darling, myself, with a capital stock of \$100,000, to engage in the business of supplying water to the town of Conrad. A plant for that purpose had been constructed at that time by Ben Hager, one of the incorporators. The meeting for the organization of the company was held August 26th, 1910, at [50] which were present Ben Hager, M. S. Darling and George H. Stanton, the directors appointed in the articles of incorporation. There had been twenty shares subscribed by M. S. Darling and George H. Stanton, at the time the articles were filed. At the meeting of the incorporators, Ben Hager, M. S. Darling and M. B. Hager were elected directors, and upon the organization of the board M. B. Hager was elected President, Ben Hager, Vice-President, and M. S. Darling, Secretary and Treasurer. M. B. Hager was the son of Ben Hager. At the meeting held on the same day at four o'clock P. M., the directors were all present, and the following resolution was passed with reference to the acquisition of property by the company:

(Reading from Page 8 of the Minute-Book, Plaintiff's Exhibit "A.")

**Plaintiff's Exhibit "A"—Excerpts from Minute-book of Conrad City Water Co.**

"The proposition was then made to the meeting by Ben Hager to sell to this Company the franchise



under which the said system of waterworks was built, together with all reservoirs, reservoir sites, pipe lines, easements, right of way, contract rights, machinery, equipment and all property of whatsoever kind or character owned and used by him in connection with the waterworks system recently built and put in operation for use in the town of Conrad, Teton County, Montana, in consideration of the issuance and delivery to him, as full paid, 99,980 shares of the capital stock of this company, and the sum of Seventy Thousand Dollars (\$70,000), to be evidenced by the promissory note of the company, and secured by its first mortgage six per cent, gold bonds, hereafter to be issued. It appearing to the stockholders that the property and rights so to be acquired are reasonably worth the price at which the same are offered, the following resolution was duly submitted, and upon motion, was unanimously adopted by the vote of stockholders representing and holding all the capital stock of this company [51] subscribed for, issued or outstanding, to wit:

“BE IT RESOLVED, by the stockholders of Conrad City Water Company that the proper officers of this company, by and with the consent and authorization of the Board of Directors be, and they are hereby, directed and empowered to purchase and receive from Ben Hager the system of waterworks in the town of Conrad, Teton County, Montana, including all contract rights, reservoir sites, reservoirs, pipelines, easements, rights of way, machinery and equipment, and all property owned and used by him in the conduct of the business of said waterworks system,

including the franchise granted by the town of Conrad for the construction and operation of such system of waterworks, and that the same be paid for by the issuance and delivery to him, as full paid, 99,980 shares of the stock of this company, and also the promissory note of this company for the sum of Seventy Thousand Dollars (\$70,000) to be made for such period of time, and at such rate of interest as the said officers may agree upon, and such note to be secured by eighty Thousand Dollars (\$80,000) face value of the first mortgage, six per cent, gold bonds of this company, hereafter to be issued and negotiated for the corporate purposes of the company. And the said officers, by and with the consent and authorization of the Board of Directors, are hereby directed and empowered in the name, under the seal, and on behalf of this corporation to perform any and all acts, and execute all papers which are or may be necessary or proper to fully carry out and complete the purchase of said property for the consideration aforesaid; and authority is hereby conferred upon said officers, in the exercise of their judgment and discretion, to determine the legality and sufficiency of all instruments in writing transferring to this company the property and rights aforesaid; and in determining and agreeing upon the time of maturity and rate of interest of the promissory note, so [52] to be given, and the form of the bonds and coupons, and of the provisions, stipulations and conditions to be contained in the deed of trust, hereafter to be executed, to secure said bonds."

Ben Hager, who was present at that meeting as a

stockholder, was the same who made the proposition, and M. B. Hager was his son. The notes described in the resolution were never delivered to Hager, but the issue of bonds were. The mortgage trust deed therein described was executed and delivered to the Pondera Valley State Bank, the trustee named therein. Whereupon the trust deed was identified as Exhibit "B," and offered in evidence, but its contents are not material to this appeal.

There was no \$70,000 note delivered to Hager, but notes representing the indebtedness referred to in the resolution were given to the different interests who had put up money for the construction of the plant. The notes, with interest, on the 18th day of April, 1911, amounted to the sum of \$68,474. The Conrad City Water Company, at the date of its resolution, was not indebted to Hager in any sum except as represented by these notes. At that time the bonds were delivered to Mr. Hager, and then to Mr. Conrad, to secure the payment of these notes, but no resolution to that effect was put upon the minutes of the company. A resolution was passed on the 18th day of April, 1911. Thereupon the notes were marked Plaintiff's Exhibits "C," "D," "F" and "G," and introduced in evidence. Exhibit "C" was a note dated April 18th, 1911, for \$13,930, payable to the order of the Conrad Townsite Company. Exhibit "D" was a note dated April 18th, 1911, for \$48,275, payable to the order of Conrad Brothers. Exhibit "F" was a note dated April 18th, 1911, for \$850.00, payable to W. G. Conrad. Exhibit "G" was a note dated April 18th, 1911, for \$5,419.00, payable to the



order of the Pondera Valley State Bank. All the notes were payable 180 days after date, at the Conrad Trust and Savings Bank, Helena, Montana, bearing [53] interest at the rate of eight per cent from date, and attached to each was a collateral agreement described the collateral attached as \$80,000 par value of the bonds of the Conrad City Water Company; one hundred thousand shares of the capital stock of the Conrad City Water Company; 37,997 shares of the Belgrade Water Company's stock, and the note of M. S. Darling for \$10,000.

On the same day and at the same meeting, the following proceedings were had:

(Minute-book, Exhibit "A," page 49.)

"A special meeting of the Directors of the Conrad City Water Company was held on this 18th day of April, 1911. Present, Ben Hager and M. S. Darling. There being a quorum of Directors present, the following resolution was offered:

'WHEREAS, the Conrad City Water Company has issued gold bonds of the Company aggregating \$80,000, secured by first mortgage or deed of trust upon all the property and assets of the company, and

'WHEREAS, the object and purpose of issuing said bonds was to pay for said plant, and

'WHEREAS, the money for the construction of said water works and building of said plant was furnished by the following named persons in the amount set opposite their names:

Conrad Brothers .....	\$48,275.00
Conrad Townsite Company.....	13,930.00
Pondera Valley State Bank.....	5,419.00
W. G. Conrad.....	850.00

‘WHEREAS, it is desired that the sums so advanced by said parties shall be repaid and secured.

‘NOW, THEREFORE, be it resolved, that the Vice-President and Secretary of this company be, and they are hereby, authorized, directed and empowered, to execute the note of the company to the [54] aforesaid parties, for the amount so advanced by each.

‘BE IT FURTHER RESOLVED, that the \$80,000 worth of bonds of said company shall be turned over and delivered as security for each of said notes.’

Upon motion duly made and seconded, the said resolution was unanimously carried and adopted.

The resignation of M. B. Hager as a Director and President of the Company was then presented by Mr. Ben Hager, and upon motion duly made and seconded, same was accepted.”

At this meeting Ben Hager and M. S. Darling were present. The bonds referred to in the resolution is the same issue as described in the trust deed. There had also been deposited as security for this indebtedness the \$100,000 of the capital stock of the company, for which there had not been paid anything, the same having been issued to Ben Hager in exchange for the property of the company which had been transferred by him in accordance with the original resolution. Ben Hager never at any time paid any cash for any of the shares of stock except for the twenty shares that was originally subscribed. The indebtedness to the Conrad Townsite Company was for money advanced by the Conrad Townsite

Company in the construction of the water system, at the request of Mr. W. G. Conrad. The Directors of the Conrad Townsite Company were Harfield Conrad, the son of W. G. Conrad, and M. S. Darling. The note to Conrad Brothers was given for moneys advanced for the construction of the water system, at the request of Mr. W. G. Conrad, and the note to the Pondera Valley State Bank was for moneys advanced. All of these moneys that had been advanced were first asked for by Mr. Hager, and then authorized by Mr. W. G. Conrad, or secured by his endorsement. The plant had been constructed by means of these advances prior to the organization of the company. There was no other meeting of the officers or directors of the [55] corporation from the time it was organized in August, 1910, until April, 1911, and from April 18th, 1911, until the 3d day of January, 1913, at which time a resolution was passed for the sale of a new bond issue, but nothing came of it.

On cross-examination witness testified that Mr. Hager turned over to the Conrad City Water Company in payment for the 99,980 shares of stock which were issued to him, a thirty-year franchise from the City of Conrad, rights of way for pipe-line, office building and site on Main Street, in Conrad, and personally superintended the constructions of the plant. That the company obtained the benefit of Mr. Hager's services, and that he did not receive any salary other than said stock, for the work. The notes represented actual cash advances by the payees, used in the construction of the plant.



(Testimony of Mark S. Darling.)

On redirect examination, witness testified that the advances were all made prior to the organization of the company, to Ben Hager, at the request of W. G. Conrad.

Plaintiff also called Mr. Ben Hager as witness, who, after being first duly sworn, testified as follows:

**Testimony of Ben Hager, for Plaintiff.**

“During the year 1910 I was engaged in building the Conrad Water Company. The plant was started in 1909, and completed in the fall of 1910. I built it for myself and Mr. Conrad, who advanced the money for the construction of the plant as the work proceeded. I did not put into the plant any money of my own. I contributed my services. The advances represented by these notes were obtained from the various concerns. I asked Mr. Conrad whenever money was needed, and it came from the parties mentioned. At the organization of the Company in August, 1910, there was never delivered to me a note for \$70,000, nor was any such note ever executed. I never received any of the shares of stock, although they were made out to me. The issue of bonds were never delivered to me; I think [56] they were delivered to Mr. Conrad, to be sold and the indebtedness paid off out of the proceeds. Failing to sell the bonds by April, 1911, the bonds were then put up as collateral for these advances.”

On cross-examination, witness testified that the money represented by the notes was actually paid out to construct the Conrad City Water Company's plant. All of the money was deposited in the Pon-

(Testimony of Ben Hager.)

dera Valley States Bank, and checked out during the course of construction. The building lot on Main Street in the City of Conrad was paid for by him. He also transferred to the Conrad City Water Company his franchise, rights of way and pipe-lines. He never received any compensation or pay for his efforts in building the plant, except stock. The Conrad City Water Company never issued to him a note for \$70,000. Instead of making the note to him for that amount, they made notes to the companies that actually put up the money to construct the plant.

**Testimony of P. B. Bartley, for Plaintiff.**

Whereupon plaintiff called P. B. BARTLEY. Witness being duly sworn, testified as follows:

“I am the cashier of the Conrad Trust and Savings Bank, a corporation engaged in banking business in Helena, Montana. Mr. W. G. Conrad was one of the organizers of the bank, and for a number of years its president. The issue of bonds described in the trust deed came into my possession in the Fall of 1913, from Mr. Conrad, together with the stock of the company. The bonds and stock were sold under pledgee’s sale, and I was told to bid them in. The sale was conducted by Mr. McConnell, and I bought the bonds at the sale, together with certificates of stock and the note signed by M. S. Darling. I was acting for the creditors. I had no personal interest in the matter whatsoever, and paid nothing for the bonds. The bonds and stock at that time were delivered to Mr. Conrad, and remained in his possession until later in the year, when he [57]

(Testimony of P. B. Bartley.)

turned them over to me to hold as trustee. I have no other connection with this transaction at all."

Whereupon plaintiff offered in evidence Exhibit "H," identified as the Notice of Sale, which described the collateral that was attached to the bond issue. The witness testified that he had the bonds present in court.

On cross-examination witness testified that the sale actually took place at the time and place indicated, and that the property pledged was actually sold and bid in by him and delivered to Mr. Conrad.

### **Testimony of Patrick Kelly, for Plaintiff.**

Thereupon the plaintiff called as witness PATRICK KELLY, who, after being first duly sworn, testified as follows:

"I am the president of the Pondera Valley State Bank; in August, 1910, I was vice-president and cashier. The Pondera Valley State Bank is the trustee of the trust deed introduced in evidence. The trust deed was delivered to the Pondera Valley State Bank, and we had it recorded. We never had in our possession the bonds. We were requested to foreclose the trust deed, but I do not remember the date when the suit was started. Mr. Bartley holds some of the bonds as trustee for us."

On cross-examination the witness testified that the Pondera Valley State Bank had actually advanced the money represented by the note Exhibit "G," which had not been paid, and that the Conrad Townsite Company and Conrad Brothers had also



(Testimony of Patrick Kelly.)

advanced money represented by the notes introduced in evidence, which had not been paid.

Thereupon, as part of the cross-examination, defendants offered in evidence "Exhibit 1," being a certified copy of the Complaint in the District Court of the Eighth Judicial District of the State of Montana, in and for the county of Teton, filed June 23d, 1915, to show that proceedings had been started to foreclose the mortgage. [58]

To this offer the plaintiff objected until it had been shown that the plaintiff in this action had been served with summons and was in reality a party to the suit, and on the further ground that the proceedings were commenced after the commencement of this action, and therefore could not affect the jurisdiction of the Court.

Which objection was by the Court overruled, and exception taken.

Witness continuing testified that James T. Stanton had been appointed receiver, and was in charge of the Conrad City Water Company's plant, and "Exhibit 2" and "Exhibit 3," being certified copies of the appointment of receiver, were offered and read in evidence. These exhibits are not herein inserted, for the reason that they are attached to the answer of the defendant James T. Stanton, and made part of this record.

Thereupon, witness continuing, testified that a suit had been instituted in the District Court of Teton County by the Conrad Mercantile Company against the Conrad City Water Company, in which the Pon-

(Testimony of Patrick Kelly.)

dera Valley State Bank, as trustee, had intervened. This suit was brought prior to the foreclosure suit.

Thereupon the defendants' attorney offered in evidence the original complaint of the Conrad Mercantile Company against the Conrad City Water Company, and also the complaint in intervention of the Pondera Valley State Bank, to which offer the plaintiff objected on the ground that the same was incompetent, irrelevant and immaterial to any of the issues in this action, in that the complaint was filed after the lien of the plaintiff had been secured by the filing of the writ of attachment in this case, which was subsequently ripened into judgment, following the levy of execution, and therefore the jurisdiction of this court over the property of the Conrad City Water Company to enforce the collection of the judgment could not be ousted by any proceedings [59] in the State court. And also for the further reason that the complaint under which the receiver was appointed in the District Court of the Eighth Judicial District did not state facts sufficient to confer on the State Court jurisdiction to appoint a receiver, and oust this court of jurisdiction to enforce its judgment, rendered in the action in which the plaintiff recovered judgment sued on.

Which said objection was by the Court overruled, and exception taken, and thereupon the papers were introduced in evidence as follows:

**Defendant's Exhibit 5—Complaint in Conrad Mercantile Co. v. Conrad City Water Co.**

“[Title of Court and Cause]:

**COMPLAINT.**

**THE PLAINTIFF COMPLAINS AND FOR A CAUSE OF ACTION AGAINST SAID DEFENDANT ALLEGES:**

First. That the plaintiff is now and at all the times hereinafter mentioned and referred to was a corporation organized and existing under and by virtue of the Laws of the State of Montana.

Second. That defendant is now and at all the times hereinafter mentioned and referred to was a corporation organized and existing under and by virtue of the Laws of the State of Montana.

Third. That said defendant corporation now and at all the times hereinafter mentioned and referred to was the owner of a certain franchise known as Ordinance No. 2-A, passed by the Town Council of the said town of Conrad, and approved by the Mayor of said town on the 13th day of November, 1909, being an ordinance or franchise granting to Ben Hager, and to his successors and assigns, for the period of thirty (30) years the right to construct, maintain and operate a gravity and pumping system of water works in said town, and the right to sell water to the said town and to the inhabitants thereof, [60] which franchise, for value, was thereafter duly assigned to said defendant. That under the terms of said franchise it becomes and is necessary for defendant corporation to furnish to



the town of Conrad and its inhabitants a sufficient and dependable supply of water for municipal and domestic use and also as and for fire protection and said defendant corporation accordingly now and at all times hereinafter mentioned and referred to under the terms of said franchise is obliged to furnish to the said town of Conrad and the inhabitants thereof and deliver through its various water mains and water service pipes, a sufficient supply of water for the use of the said town of Conrad in the exercise of its functions as a municipal corporation and also for the use of the property owners and inhabitants of said city. That the pumping plant hereinafter referred to is simply a part of said water works and water service system whereby defendant corporation is enabled to comply with and perform the terms and conditions of its said franchise and *and* distribute and deliver through its water mains at the various points in the town of Conrad, Montana, a necessary quantity of water for the convenience and use of the residents of said city.

Fourth. That the plaintiff during that period of time commencing on the 1st day of September, 1914, and ending on the 10th day of March, 1915, did furnish material and supplies to and for the water works system of said defendants in Teton County, Montana, all of which said material and supplies were furnished, sold and delivered to said defendant corporation at its special instance and request, all of which were used in and about the completion of that certain pumping plant of defendant corporation situate and located in the northwest corner of the

southeast quarter of Section Eighteen (18) Township Twenty-eight (28) North, Range Four (4) West, Montana Meridian, Teton County, Montana, and upon the water works and water system of Conrad City [61] Water Company extending from the said wells and pumping plant situate upon the aforesaid parcel of land to and throughout the town of Conrad, Montana, for the purpose of distributing water through the service pipes of defendant corporation and furnishing water supply to the town of Conrad and to its inhabitants, said improvement consisting of one entire unit or system commonly known as the plant of Conrad City Water Company. That all the materials and supplies thus furnished were used in and upon said improvement and said Conrad City Water Company's plant, and became a material, valuable and permanent part thereof.

Fifth. That the said materials and supplies thus furnished by plaintiff as aforesaid, a more particular and specific description of which is set forth in the statement of account annexed to and made a part of plaintiff's claim of lien hereinafter referred to, were all used in, about, upon and became a permanent part of said pumping plant, water works and water service system of defendant corporation and were necessary for the use, construction and completion of said pumping plant and were and are of the reasonable value of Fifty-four and 70/100 Dollars (\$54.70) which amount the said defendant corporation promised and agreed to pay plaintiff therefor.

Sixth. That plaintiff furnished the last of said material to said defendants on March 10, 1915, and

that said defendant has not paid for said material or any part thereof and the full amount thereof, to wit: Fifty-four and 70/100 Dollars (\$54.70), together with legal interest thereon from March 10th, 1915, still remains due, owing and wholly unpaid, from said defendant to this plaintiff at the time plaintiff filed its certificate of lien as alleged in the succeeding paragraph and at the present time.

Seventh. That plaintiff duly filed as required by law its claim for a lien for the amount due and owing it as aforesaid [62] from said defendant in the office of the Clerk and Recorder of Teton County, Montana, on the 16th day of March, 1915, within ninety days after the completion of the furnishing of said material, which said claim of lien so filed was duly signed and verified by J. C. Price, the President and Manager of the Plaintiff corporation, and contained a just and true account of the amount due plaintiff after allowing all credits and also containing a correct description of the property to be charged with such lien and also the name of the owner of the said property and the person whose interest therein was sought to be charged with said lien, namely, the name of the said defendant, also the date when the last of said material was furnished by this plaintiff to said defendant, and a statement of all other facts relating thereto, a copy of which said claim of lien is hereunto annexed and made a part hereof and marked Exhibit "A" and by said reference made a part of this complaint as fully and effectually to all intents and purposes as if herein set forth *verbatim*.



Eighth. That this plaintiff has been obliged to pay and did pay the sum of Fifty cents for filing said lien.

Ninth. That there is a deed of trust or mortgage on all of the property of defendant corporation heretofore executed on August 26th, 1910, to Pondera Valley State Bank, as Trustee, to secure a bonded indebtedness aggregating Eighty Thousand Dollars (\$80,000) with six per cent interest thereon and that said corporation is indebted to various persons, firms and corporations in the sum of more than \$96,000, and all its property and assets are worth less than \$60,000, and said defendant is now absolutely insolvent and has confessed its inability to care for its said water works and water service system and to continue to operate the same and is without money or means of obtaining or borrowing money with which to continue the operation of its said water service system. [63]

Tenth. That said defendant has absolutely no means or resources from which to pay the said money thus due from it and no property upon which it can give security to raise said money either for the purpose of liquidating its said indebtedness or continue the operation of its said plant. That said defendant is absolutely insolvent and without the funds, means or money with which to continue its operations or to maintain its said waterworks and water service system or any part thereof, or to even care for or preserve said waterworks and water service system or any part thereof. That said water plant must be kept in operation so as to furnish the town

of Conrad and the inhabitants thereof a water supply for municipal and domestic purposes and for fire protection. That in order to do this requires constant care and attention and constant supervision and the expenditure of a considerable amount of money daily in order to pump and supply sufficient water for delivery through the mains of defendant corporation for the benefit of the general public living at and in the vicinity of Conrad, Montana. That the entire value of defendant's plant and water system consists in its being maintained and operated in good condition and repair and that if its operation should cease as an unavoidable result the town of Conrad and the inhabitants thereof will be deprived of water with which to operate or flush its sewer or plumbing system in the various homes, hotels and public buildings there so that great and irreparable loss and injury would result, not only to the defendant corporation but to the public at large. That unless said plant of defendant is thus operated and unless it continues to deliver water under its various contracts with the town of Conrad and the owners of the buildings therein and the inhabitants thereof said water service system will be materially injured and depreciated in value and rendered virtually valueless and this plaintiff will be deprived of the only security [64] upon which it has a lien and the only property and assets upon which it can assert a valid claim for reimbursement of the moneys thus due plaintiff as aforesaid.

Eleventh. That defendant's waterworks and water supply system is valuable only as a going concern because should it suspend operations the plant

itself will be materially injured, depreciated in value and plaintiff's security impaired, rendered valueless and lost to this plaintiff and the very franchise under which defendant operates and which is its principal asset will become subject to forfeiture and revocation by the Town Council of Conrad, and it will be valueless to plaintiff and defendant as well, thereby depriving plaintiff of the property upon which it has a lien for the satisfaction of its aforesaid claim. That unless defendants' said water plant is kept in operation defendant will be *expected* to innumerable suits and claims for damages for the various property owners and inhabitants of the town of Conrad who are absolutely dependent upon defendants said plant for water supply to protect their property against loss and destruction by fire and to protect the health and welfare of themselves and all people residing within or visiting the town of Conrad. That in event of the said defendant corporation even temporarily suspending its operation hundreds of people dependant upon it for water supply will be instantly deprived of water and be irreparably damaged and will sustain great and irreparable loss and great suffering and want and said defendant will become liable to its water users for damage thus caused by suspending its operations of said water system. That defendant is without funds to continue its operations and unless a receiver is appointed forthwith must suspend its operations and the maintenance, care and protection of its assets and property and particularly its water plant and water service system, and unless a receiver is forthwith appointed there will be a multiplicity [65].



of suits and litigation against said defendant and innumerable damage claims which will utterly ruin defendant corporation, waste and squander its assets, and permit the same to be materially injured, dissipated and rendered valueless to this plaintiff and the various other creditors and all parties interested in defendant corporation, so that plaintiff will lose the property upon which it has its aforesaid lien and which property if administered upon by a receiver will ultimately yield sufficient income to pay plaintiff's claim and satisfy a portion of defendants other indebtedness.

That unless a receiver is appointed said property will not yield any revenue or income and plaintiff's claim will become a total loss.

Twelfth. That said defendant is obligated by its aforesaid franchise with the town of Conrad to furnish water to said town and the inhabitants thereof, and all its assets consist of said franchise and said water plant. That there are hundreds of home builders absolutely dependent for water supply to be furnished and now being daily furnished by said defendant, and unless a receiver is appointed the pumping, carrying and delivering of water to said settlers and home builders will be suspended forthwith to their great loss and detriment. That to permit said defendant corporation because of its insolvency to even temporarily suspend the pumping and delivering of water or to fail to furnish or deliver water through its said system or to delay in delivering the water in accordance with the vested right of the home builders and property owners of Conrad and the multitude of inhabitants thereof who

are resident taxpayers within the State of Montana, and to expose their property to loss or destruction by fire because of the failure of defendant to deliver said water, would be a public calamity and would bring almost unending suffering, loss and want upon innocent settlers and home builders. [66] That all this can be avoided by the appointment of a receiver to immediately take charge of the assets and property of the defendant corporation and unless a receiver is forthwith appointed by this Honorable Court the maintenance and operation of defendant's said water plant will cease and be suspended because of defendant's lack of credit and funds and inability to raise funds with which to maintain its said water plant or continue the operation thereof or even to preserve said plant and pipe-lines and water service system from great depreciation, loss and injury.

Thirteenth. That the nature and scope of the corporate purposes for which defendant was formed are such and the object and purpose of its said franchise from the town of Conrad are such, and its innumerable contracts for the delivery of water to the multitude of owners and occupants of property at and in the vicinity of Conrad, Montana, are such that the defendant is a *quasi*-public corporation and its purposes and project are public utilities of an exceedingly high character and accordingly the work of maintaining and operating the said water system and repairing the same and if necessary increasing and enlarging its capacity so as to serve the public at large advantageously are of such vital importance to the State of Montana and its citizens at large as to justify this Honorable Court as recognizing de-

fendant corporation as belonging to that class of public service enterprises for whose preservation on behalf of the general public, the exercise of the highest degree of power by a Court of Equity is justified and required by the public policy of this State as evidenced by its constitution and codes, and that unless a receiver is forthwith appointed, empowered to take immediate charge of defendant corporation and all its assets and administer upon the same and maintain and operate said water service system the same will become a loss to all parties in interest, [67] and will be the cause of loss and suffering to the innocent home builders and settlers dependant upon defendant for water supply, for domestic uses and fire protection.

Fourteenth. That the affairs of defendant corporation because of its insolvency are in a chaotic condition and it is impossible for defendant to continue operating excepting under a receiver. That to preserve and protect said plant from great loss, damage and detriment further expenditures must be made thereon but defendant has absolutely no means of raising funds to thus protect its said plant or repair or improve the same, and unless such repairs and improvements are made promptly the water supply of defendant corporation will cease to become available to the town of Conrad or its inhabitants and said corporation must cease to operate. Plaintiff alleges that it will require the immediate expenditure of at least \$1,000 to continue the operation of defendant's plant and further expenditures will undoubtedly become necessary to preserve said plant and the property upon which said plaintiff has



its lien from great loss and material depreciation in value. That there is absolutely no way for defendant corporation to thus protect and preserve its property or continue its operations of its said water service system and accordingly it is imperatively necessary that a receiver be forthwith appointed to take charge of the assets and property of said defendant. That the property subject to plaintiff's lien is in imminent danger of being lost, materially injured, depreciated in value and rendered worthless to plaintiff and all parties interested in the affairs of defendant corporation unless a receiver is forthwith appointed. That in order to protect the property of various taxpayers of Conrad from great loss and destruction and to maintain defendant's said plant and protect it from depreciating and being materially injured, the appointment of a receiver for the defendant is an imperative necessity, since defendant is [68] financially unable to continue its operations of its said water service system or even to maintain the same or protect it from great loss and depreciation.

WHEREFORE, plaintiff prays for judgment against said defendant as follows:

1. That a receiver be immediately appointed by this Honorable Court to take charge of all the assets and property of defendant corporation, and to maintain, preserve and operate the same and to hold all of said property and the income thereof subject to the order of this Honorable Court for the use and benefit of this plaintiff and all parties in interest as this Honorable Court may direct.

2. That it may be adjudged and decreed that this plaintiff has a valid lien upon all the property described in the fourth paragraph of plaintiff's complaint on file herein, together with all the water, water rights, franchises, and appropriations used in connection therewith and for the use and enjoyment of which the said water system has been constructed and installed, to secure the payment to this plaintiff from defendant of the sums due this plaintiff as hereinbefore alleged, together with plaintiff's costs and disbursements herein incurred, and that all of said property may be ordered and directed to be sold under an order and decree of this court and the proceeds thereof applied to the payment of plaintiff's claim as aforesaid, or that such other and further order may be made and such further relief afforded as this Honorable Court may deem proper.

3. That plaintiff may have judgment against defendant for the sum of \$54.70, together with legal interest thereon from March 10th, 1915, together with all its costs and disbursements herein incurred, including the filing fee of said lien.

4. That the usual decree may be drawn for the sale of said property, or such part thereof as may be necessary to satisfy [69] plaintiff's claim.

PERRY D. TRIMBLE,

Attorney for Plaintiff.

State of Montana,  
County of Teton,—ss.

J. C. Price, being first duly sworn, on oath deposes and says: That he is an officer, to wit: The President and Manager of Conrad Mercantile Company, a cor-

poration, named as plaintiff in the foregoing complaint; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own personal knowledge.

J. C. PRICE.

Subscribed and sworn to before me this 16th day of March, 1915.

[Seal]

PERRY D. TRIMBLE,  
Notary Public for the State of Montana, Residing  
at Great Falls.

My commission expires March 9, 1918.

**Exhibit "A" to Complaint in Conrad Mercantile Co.  
v. Conrad City Water Co.**

KNOW ALL MEN BY THESE PRESENTS:  
That Conrad Mercantile Company, a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its principal office and place of business located at Conrad, Montana, did, during that period of time commencing on the 1st day of September, 1914, and ending on the 10th day of March, 1915, furnish material and supplies for that certain pumping plant of defendant corporation hereinafter designated as "improvement" erected, constructed and situated upon the parcel of land to which this lien applies and attaches, to wit:

The northwest quarter of the southeast quarter of Section Eighteen (18), Township Twenty-eight (28) North of Range Four (4) West, Montana, Meridian, Teton County, Montana, and upon the waterworks and water service system of Conrad City Water Company extending from the said wells and pump-



ing plant situate upon the aforesaid parcel of land to and throughout the [70] town of Conrad for the purpose of distributing water through the service pipes of defendant corporation and furnishing water supply to the town of Conrad and to its inhabitants, said improvement consisting of one entire unit or system commonly known as the plant of the Conrad City Water Company. That all the material and supplies thus furnished were used in and upon said improvement and said Conrad City Water Company plant and became a material valuable and permanent part thereof; that the value of the material and supplies thus furnished for the foregoing improvement upon the foregoing described land and water plant amounted to the sum of \$54.70, which will more fully appear by the itemized statement of said material and supplies hereto annexed, marked Exhibit "A" and made a part hereof, which statement is a just and true account of the amount due Conrad Mercantile Company for the aforesaid material and supplies after allowing all credits thereon.

That said material and supplies are set forth in said statement marked Exhibit "A" were and are worth the reasonable prices therein charged therefor and that all of said material and supplies and the whole thereof so furnished by Conrad Mercantile Company were necessary for the construction, completion and repair of said improvement, waterworks and water service system of Conrad City Water Company, and the whole thereof were used in and upon the construction, completion and repair of said improvement, waterworks and water service system

of Conrad City Water Company during the time aforesaid and at the special instance and request of Conrad City Water Company, the person for whose immediate use and benefit the said material and supplies were furnished; that the owner and reputed owner of the aforesaid improvement, waterworks and water service system and the lands hereinbefore specifically described upon which said improvement, waterworks and water service system is situated is now and [71] during all the period of time aforesaid was Conrad City Water Company, and that each and all of said articles, material and supplies were actually furnished by Conrad Mercantile Company and used in the construction, completion and repair of said improvement, waterworks and water service system with the full knowledge, consent and approval of said Conrad City Water Company, the person against whose property this lien is filed; that the legal title of record to the land hereinbefore described and the said waterworks and water service system during all the period of time hereinbefore mentioned and referred to and does now stand in the name of Conrad City Water Company.

That desiring to benefit itself of the benefit of Chapter 2 of Title 4 of the Revised Codes of the State of Montana, being Sections numbered 7200 to 7300, inclusive, of the Revised Codes of the State of Montana for the year 1907, it is the intention of said Conrad Mercantile Company to file this statement of account in the office of the clerk and recorder of Teton County, Montana, within the time provided by law in order to secure the payment of the amount

due said Conrad Mercantile Company on said account.

That no part of said amount aforesaid, viz.: \$54.70, has been paid except the sum of NO dollars, and the full balance thereof, to wit: \$54.70 is justly due, owing and wholly unpaid on said account after allowing all credits thereon, all offsets and any and all counterclaims; that said Conrad Mercantile Company accordingly claims the benefit of the laws of the State of Montana relating to liens upon real property and claims a lien upon the foregoing described improvements and land for the satisfaction of the amount so due it as aforesaid, also claiming a lien upon the entire water system of said debtor and the satisfaction of the amount so due it as aforesaid, claiming said lien upon said improvement and upon the land upon which the same is situate and the entire system of said debtor to the highest extent in area or [72] acreage to which said Conrad Mercantile Company can or could lawfully make claim under and by virtue of the provision of Chapter 2 of Title 4 of the Revised Codes of the State of Montana for the year 1907.

CONRAD MERCANTILE COMPANY.

By J. C. PRICE,  
Manager.

State of Montana,  
County of Teton,—ss.

J. C. Price, being first duly sworn, on oath, deposes and says: That I am the manager of the Conrad Mercantile Company; that I have read the foregoing notice and claim of lien and know the contents



thereof; that said statement and notice of lien contains a just and true account of the amount due said Conrad Mercantile Company for materials and supplies as therein set forth after allowing all credits thereon and all offsets and counterclaims; and also contains a correct description of the property to be charged with said lien, and that all the allegations of said notice and statement of lien are true of my own knowledge; that I have also examined the statement of account annexed to said lien claim and made a part thereof and marked exhibit "A," and that the same contains a just and true account of the amount due Conrad Mercantile Company after allowing all credits thereon, all offsets and counterclaims, and is true and correct in all respects of my own personal knowledge.

J. C. PRICE.

Subscribed and sworn to before me this 16th day of March, 1915.

[Seal]

PERRY D. TRIMBLE,

Notary Public for the State of Montana, Residing at  
Great Falls.

My commission expires March 9, 1916.

# EXHIBIT "A."

## CONRAD CITY WATER COMPANY

In account with

CONRAD MERCANTILE COMPANY.

[73]

1914.

Sept.	1.	Bolts, \$2.00, 5 gals. Gasoline \$1.75..	3.75
	2.	Sand Paper .....	1.05
	2.	Galvanized ....	.25

	5.	Paint . . . . .	1.25
	12.	Paint . . . . .	.35
	14.	10 lbs. nails . . . . .	.50
	15.	Paint . . . . .	2.00
	19.	5 lbs. cup grease . . . . .	.85
	21.	Oil . . . . .	1.50
Oct.	2.	1 Oiler .25, 2 cans paint, .25 gal. Oil 1.00 . . . . .	1.50
		Packing .10 Solder .35 . . . . .	.45
	14.	6¼ sheets packing . . . . .	7.50
		1 pick handle coupling . . . . .	.35
	15.	2½ lbs. nuts .30 packing .10 . . . . .	.40
	16.	bolts . . . . .	2.75
	23.	Batteries . . . . .	2.10
	27.	Bolts and nuts . . . . .	1.40
Nov.	5.	2 gals. oil . . . . .	2.00
	9.	5 gals. oil . . . . .	1.50
	12.	paint . . . . .	.20
	13.	Solder . . . . .	.15
	23.	5 lbs. cup grease . . . . .	.85
	28.	paint . . . . .	.20
	24.	paint . . . . .	1.50
Dec.	1.	2 Unions 1½" .80 packing .25 . . . . .	1.05
	7.	1 file . . . . .	.30
	8.	1 coupling .10 plug .05 . . . . .	.15
	10.	2½" plugs . . . . .	.05
	12.	Belt lacing .50 cyl. oil .75 gal. oil 1.50 . . . . .	2.75
	14.	Coupling plugs . . . . .	.45
	28.	10 lbs. grease . . . . .	1.85

1915.

Jan. 12.	Solder .....	.35
19.	" .....	.35
20.	Batteries ..	1.40
25.	6 Batteries .....	2.10
29.	3 sheets emery paper.....	.15
30.	5 lbs. grease.....	1.00
Feb. 1.	4 lbs. nails.....	.20
2.	1 $\frac{3}{4}$ lbs. sheet packing.....	2.10
	5 gals. gasoline.....	1.75
6.	5 gals. oil.....	1.00
8.	2 lbs. nails.....	.10
23.	5 lbs. cup grease.....	.85
24.	2 1" hose clamps.....	.40
Mar. 4.	Packing ....	1.00
10.	1 pail grease.....	1.00
		<hr/>
		\$54.70

State of Montana,

County of Teton,—ss.

I, James Gibson, Clerk of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, do hereby certify that the foregoing is a true and correct copy of complaint in the case of Conrad Mercantile Company, a corporation, vs. Conrad City Water Company, a corporation, now on file and of record in my office.

WITNESS my hand and the seal of said Court this 20th day of April, 1916.

[Seal]

JAMES GIBSON,

Clerk.

Whereupon Defendant's Exhibit 6, in words and figures as follows, to wit:



**Defendant's Exhibit 6—Complaint in Intervention  
of Pondera Valley Trust Bank, as Trustee, etc.**

[Title of Court and Cause.]

**COMPLAINT IN INTERVENTION.**

Now comes Pondera Valley State Bank, as Trustee, Intervenor [75] hereinafter designated for brevity, Plaintiff, and by leave of Court first had and obtained, filed this as its complaint in Intervention on the above-entitled cause and as the ground of its intervention, complains and alleges:

First. That Pondera Valley State Bank, Intervenor, hereinafter designated as plaintiff, is now and at all the times hereinafter mentioned and referred to was a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its office and principal place of business located at Conrad, Teton County, Montana.

Second. That the defendant Conrad City Water Company is now and at all the times hereinafter mentioned or referred to was a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its office and principal place of business located at Conrad, Teton County, Mont.

That the defendant Mercantile Company is now and at all the times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Montana, with its office and principal place of business at Conrad, Teton County, Montana.

That the defendant Pacific Coast Pipe Company is now and at all the times hereinafter mentioned or referred to was a corporation duly organized and existing under and by virtue of the laws of the State of Washington.

Third. That the defendant Conrad City Water Company hereinafter designated for brevity as the Company, on August 26th, 1910, by virtue of the power and authority conferred upon it by the laws of the State of Montana, under its charter or articles of incorporation and for the purpose of raising funds with which to carry on its corporate purposes by Resolution duly passed and unanimously adopted by its shareholders and directors at legal and regular meetings of both the stockholders and the [76] Board of Directors of said Company, duly and lawfully called and held, authorized and directed the execution and issue of its coupon bonds to the aggregate amount of \$80,000 of principal being forty bonds of \$1,000 each numbered from 1 to 40, both inclusive, 48 bonds of \$500 each, being numbered 41 to 88, both inclusive, and 160 bonds of \$100 each, numbered from 89 to 248, both inclusive.

Fourth. That to secure the payment of the principal of the bonds aforesaid, according to the respective terms of said bonds, and of the coupons pertaining thereto, and the performance of the covenants therein contained, the Company, in pursuance of the concurrence of all holders of the capital stock of said Company and in conformity with law, and to the resolutions and authority of its Board of Directors, duly executed, acknowledged and delivered to

Pondera Valley State Bank as Trustee, a Mortgage or Deed of Trust bearing date August 26th, 1910, a true copy of which said mortgage is hereto annexed, marked exhibit "A," and made a part of this complaint as fully and effectually to all intents and purposes as if said original Mortgage or Deed of Trust were set forth in this paragraph *verbatim*.

Fifth. That said Mortgage was duly sealed with the Corporate or common seal of Conrad City Water Company attested by its Secretary and subscribed in its corporate name by its President. That said Mortgage was duly acknowledged, approved and certified by said Company on August 26th, 1910, in all respects so as to entitle the same to be recorded in the county wherein the premises and property or any part thereof embraced in and covered by said mortgage were situate, viz.: In the office of the Clerk and Recorder of Teton County, Montana, on December 14th, 1910, at 2:00 P. M. in Book 4-B of Mortgages, at page 148 et seq., all of which will more fully appear by reference to the original mortgage. That ever since the acceptance of said trust plaintiff [77] has continued to perform and now performs its duties as Trustee thereunder.

Sixth. That in and by said Mortgage or Deed of Trust dated August 26th, 1910, said Conrad City Water Company did duly grant, bargain, sell, convey, assign, confirm, transfer and Mortgage unto this plaintiff as such trustee and its successors in trust and assigns, all the following described property. All water rights, reservoir sites, reservoirs, pipelines, easements, contract rights, franchises and



property of whatsoever kind or description now owned or which may hereafter be acquired by the said company in connection with, or being a part of, its system of waterworks in the said Town of Conrad. Also all rights acquired by the company under and by virtue of that certain franchise known as Ordinance No. 2-A passed by the Town Council of the said Town of Conrad, and approved by the Mayor of said Town on the 13th day of November, 1909, being an ordinance or franchise granting to Ben Hager and to his successors and assigns, for the period of thirty (30) years, the right to construct, maintain and operate a gravity system of waterworks in said town, and the right to sell water to the said town and to the inhabitants thereof, which franchise, for value, was thereafter duly assigned to said company.

Also all the real estate, lands, tenements, hereditaments, and easements wheresoever situate; and all buildings, engines, boilers, machinery, equipment, appliances, fixtures and apparatus now owned by the company or which it or its successors or assigns may hereafter own or acquire.

Also all rights, privileges, immunities, powers, things in action, contracts, claims and franchises, including all rights under any and all contracts or agreements in any way relating to the waterworks system or business of the company, however acquired, whether now possessed or hereafter acquired by the [78] company and used and enjoyed by it; and, also all of its property, real and personal, corporeal or incorporeal, of every kind and description, whether hereinbefore specifically enumerated or not,



or whether now owned or hereafter to be acquired, together with all and singular the tenements, and appurtenances thereunto belonging, and the reversions, remainders, incomes, rents, issues and profits thereof; and also all the estate, title, interest, property, possession, claim and demand whatsoever, as well at law as in equity, of the Company, of, in and to the said premises and property and every part and parcel thereof with the appurtenances.

Seventh. That at the time of the execution of said Mortgage or deed of trust the defendant, Conrad City Water Company, was also the owner of the following described property which accordingly by the express terms and provisions of said Deed of Trust became and was subject thereto; viz.: The northwest quarter of the southeast quarter of Section Eighteen (18) in Township Twenty-eight (28) North of Range Four (4) West of the Principal Montana Meridian, County of Teton, State of Montana; also all right to the use of the waters of a certain spring known as the "Dipping Tank Spring" situate on the Northwest quarter of the southeast quarter of Section Eighteen (18) in Township twenty-eight (28) north, Range Four (4) West, Teton County, Montana, the waters of which spring flow upon the southwest quarter of the northeast quarter of said section 18, also the use of all the surplus water of a certain spring known as the "Water Trough Spring" situate on the southeast quarter of the northeast quarter of said section 18, also an easement or right-of-way for a water pipe-line through the south half of the northeast quarter of said section 18; also that certain water right, notice

of which was filed by one Ben Hager for record in the office of the County Clerk and Recorder of Teton County, Montana, on the 17th day of November, 1909, and recorded in (9B) of Water Rights on page 409, [79] records of said Teton County, being an appropriation of two cubic feet per second of the waters of a certain spring on or near the northwest quarter of the southeast quarter of said section 18, also the right, title and interest of Ben Hager and Birdie Hager, his wife, in and to a certain contract made the 25th day of January, 1910, between Peter Deboer and the said Ben Hager, by the terms of which the said Peter Deboer agreed to convey to the said Ben Hager, his heirs and assigns, the right to construct, maintain and use a reservoir situate partially upon the southeast quarter of the southwest quarter and the southwest quarter of the southwest quarter of section 8, in Township 28 North, Range 3 West, Teton County, Montana, and also a right of way through the southwest quarter of said section 8, and the east half of the southeast quarter of section 7, in last mentioned township and range for a pipeline to conduct water to the town of Conrad which said contract is recorded in Book 5A of Miscellaneous at page 318, Records of Teton County; also all the east thirty feet of lots numbers 26, 27 and 28 in Block numbered 4 of the original townsite of Conrad, in the County of Teton and State of Montana, according to the official plat thereof on file in the office of the Clerk and Recorder of Teton County, Montana. Also the northwest quarter of the southeast quarter of Section 18, Township 28 North, Range

4 West, together with all the buildings, structures and improvements thereon.

Eighth. That accordingly there is now subject to the lien of said Mortgage or Deed of Trust the following described property, to wit, all the property mentioned, described, set forth and referred to in the two preceding paragraphs of this complaint, together with all the buildings, structures and improvements situate thereon and all the equipment appliances owned by said Conrad City Water Company or in which it has any interest whatsoever, together with all the rights, franchises [80] and assets of said Conrad City Water Company, and all other property, real, personal and mixed or every kind, nature and description and wheresoever situate owned by said defendant, Conrad City Water Company, on August 26th, 1910, and also all other property, real, personal, mixed of every kind, nature and description wheresoever situate which has been acquired by the Company since said date, together with all the rents, issues, profits, tolls and other income thereof accruing or accrued.

Ninth. That subsequent to August 26th, 1910, Conrad City Water Company duly issued, negotiated and delivered \$80,000 face value of said twenty year Face Mortgage six per cent gold bonds, each and all of which were and are secured by the aforesaid mortgage or deed of trust. All of said bonds were signed by the proper officers of said company, with its corporate seal attached and duly attested, all in the manner and form in and by said Mortgage or Deed of Trust, provided, and were duly authenti-



cated by the signature of plaintiff to the certificates thereon, endorsed as one of the series of bonds described in the said Mortgage or Deed of Trust and in said Bond mentioned. The said bonds, so issued, authenticated, negotiated and delivered, were substantially in the form set forth in said mortgage, and were made payable, both as to principal and interest, in gold coin of the United States of America, of or equivalent to, the then present standard of weight and fineness, at the office of this plaintiff in the Town of Conrad, Montana, or at the option of the holder at the National Park Bank in the City of New York, State of New York, and bearing interest until paid at the rate of six per centum per annum, payable semi-annually on the first days of July and January in each year after date, on presentation and surrender of the annexed coupons as they severally mature, without deduction for any tax or taxes on the principal or interest thereof which said company may by any present or future [81] law be required to pay thereon or retain therefrom and each and all of said bonds so issued, authenticated, negotiated and delivered are now outstanding unpaid.

Tenth. That in and by said Mortgage or Deed of Trust it was, among other things, covenanted and agreed on the part of the said Company as follows:

“The Company covenants that it will duly and punctually pay, or cause to be paid, to every holder of any bond issued and secured hereunder, the principal and interest accruing hereunder, at the dates and place, and in manner mentioned in such bond

and in the coupons thereto belonging, according to the true intent and meaning thereof, without deduction from either principal or interest for any tax or taxes imposed by the United States or any State, County, Municipality thereof, which the company may be required to pay, or to retain therefrom under or by reason of any present or future law."

"The Company covenants, promises and agrees that as long as it has possession of said property, as hereinbefore provided, it shall and will, well and truly pay off and discharge each and every tax, assessment or other charge or liability, which may, from time to time, be lawfully levied or imposed by any competent authority upon the Company, its property and premises, rights and franchises, or upon any part thereof, the lien whereof might or would be held superior to the lien of this mortgage, and that, having possession as aforesaid, it shall and will diligently preserve all the rights and privileges granted, or upon it conferred, and all its property and premises, rights and franchises above described, subject to the lien and provision thereof, and not otherwise."

"In case default shall be made in the payment of any installment of interest on any of the aforesaid bonds, and such default shall continue for a period of three months, then the [82] Trustee may, and upon the written request of the holders of One-Third in amount of all bonds then outstanding it shall declare the principal of all the said bonds to be due and payable, and thereupon the said principal shall be and become forthwith due and payable, anything

in said bonds or herein contained to the contrary thereof notwithstanding.

“And upon said principal sum being declared due and payable, it is expressly covenanted and agreed that all rights of entry, or entry and sale, or sale without entry, or to legal proceedings for foreclosure, shall immediately belong to and be fully vested in the Trustee according to the provisions of this Mortgage as fully as though the default were made in the payment of said principal at the maturity of said bonds.”

Eleventh. That the company has made default in the aforesaid covenants and conditions contained in said Mortgage or Deed of Trust in that it has failed to pay any installment of the interest money specified in the coupons attached to the issued and outstanding bonds as follows:

The installment of interest accruing on said bonds as specified in the coupons attached thereto on July 1st, 1913, amounting to \$2400.

The installment of interest accruing on said bonds as specified in the coupons attached thereto on January 1st, 1914, amounting to \$2400.

The installment of interest accruing on said bonds as specified in the coupons attached thereon on July 1st, 1914, amounting to \$2400.

The installment of interest accruing on said bonds as specified in the coupons attached thereto on January 1st, 1915, amounting to \$2400.

That no part of the said interest money due as aforesaid has been paid and the same are now due, owing and wholly unpaid [83] from the Company



to the holders of said bonds. That said defaults in the payment of the installments of interest have continued for a period of more than three months and plaintiff alleges that after the expiration of said period of three months and upon the written request of the holders of more than one-third in amount of all of said bonds outstanding and secured by said mortgage, and upon being satisfactorily indemnified for any costs, liabilities and expenses to be incurred by it in the premises, on the 1st day of June, 1915, plaintiff did duly declare the principal of all of said bonds then outstanding, to be immediately due and payable, and the principal of each and all of said bonds did, on the said 1st day of June, 1915, become due and payable, and the said principal has ever since remained and now is due, owing and unpaid by the Company; and that there is now due, owing and unpaid by the Company on the said bonds the principal thereof amounting to the sum of \$80,000, with interest thereon at the rate of six per cent per annum from the 1st day of January, 1915, and the following installments of interest; An installment of interest amounting to the sum of \$2,400 which became due and payable on the 1st day of July, 1913, with interest thereon at the rate of six per centum per annum from the said first day of July, 1913, and an installment of interest amounting to the sum of \$2,400, which became due and payable on the 1st day of January, 1914, with interest thereon at the rate of six per centum per annum from the said 1st day of January, 1914; and also an installment of interest amounting to \$2,400, which became due and payable

on July 1st, 1914, with interest thereon at the rate of six per centum per annum from the said 1st day of July 1914, and an installment of interest amounting to \$2,400, which became due and payable on January 1st, 1915, with interest thereon at the rate of six per centum per annum from the said 1st day of January, 1915. [84]

Twelfth. That the Company made no provision for the installments of interest becoming due as aforesaid. That the Company utterly failed to pay the County and State taxes levied *levied* and assessed on said property by Teton County, Montana, for the year 1914, and suffered said taxes to become delinquent and its said property to be sold for said delinquent taxes, amounting to the sum of approximately \$1,400.

Thirteenth. That the condition of the said Mortgage or Deed of Trust has not been performed and that the property covered by said Mortgage is insufficient to discharge the mortgage debt. That the said mortgaged property is in danger of being lost or materially injured unless the same is permitted to remain in the hands of a Receiver.

Fourteenth. That said defendant Conrad City Water Company is now and at all the times hereinafter mentioned or referred to was the owner of a certain franchise known as Ordinance No. 2A passed by the Town Council of the said Town of Conrad, and approved by the Mayor of said Town on the 13th day of November, 1909, being an ordinance or franchise granting to Ben Hager, and to his successors and assigns, for a period of thirty (30) years

the right to construct, maintain and operate a gravity system of waterworks in said Town, and the right to sell water to said town and to the inhabitants thereof, which franchise, for value was thereafter duly assigned to said defendant. That under the terms of said franchise it becomes and is necessary for defendant corporation to furnish to the town of Conrad and its inhabitants a sufficient and dependable supply of water for municipal and domestic purposes and also as and for fire protection, and said defendant Conrad City Water Company, accordingly now and at all times hereinafter mentioned and referred to under the terms of said franchise is obliged to furnish to the said town of Conrad and the inhabitants thereof and deliver through its [85] various water mains and water service pipes, a sufficient supply of water for the use of the said town of Conrad in the exercise of its functions as a municipal corporation and also for the use of the property owners and inhabitants of said City.

Fifteenth. That in order to furnish said supply of water the company owns and operates a pumping plant, pipe-line and reservoir simply as a part of said waterworks and said water service system whereby the Company is enabled to pump water from wells and springs into its reservoirs and thence conduct the same by means of its pipe lines into its water mains and deliver through its said water mains at various points in the Town of Conrad, Montana, for the convenience and use of the inhabitants of the said Town of Conrad, and also for the



use of the Town of Conrad, a municipal corporation in the operation of its sewer system and fire hydrant service for the protection and conservation of property and health of the inhabitants of said municipal corporation and also the people residing in the vicinity of the Town of Conrad or transacting any business therein, as well as any people who own or who are in anywise financially interested in property located in Conrad or the immediate vicinity thereof.

Sixteenth. That said Town of Conrad has absolutely no water supply or means of obtaining water supply to flush its sewers or protect the lives and property of its inhabitants from loss, injury or destruction by fire other than the water furnished by the Company under its franchise and said town of Conrad can obtain no other water supply and that the safety, health and welfare of the inhabitants of the Town of Conrad demand that the Company shall continue to operate its plant and pump and deliver water throughout its mains and water service system and the various customers of the Company who are residents of the State of Montana, and owners and holders of property located within the said State demand that the Company shall continue to operate [86] and deliver water for their personal use as well as to protect their lives and property from destruction by fire and to enable them to operate their sewer system and thereby avoid the disease and ill-health which would necessarily result from want of an adequate water supply.

Seventeenth. That said Conrad City Water

Company is indebted to various persons, firms and corporations exclusive of the indebtedness secured by said Mortgage or Deed of Trust in the aggregate amount of \$96,000, and its total assets are worth less than \$60,000, and is now absolutely insolvent and has confessed its inability to care for its said waterworks and water service system and to continue to operate the same and is without money or means of obtaining or borrowing money with which to continue the operation of its said water service system.

Eighteenth. That said defendant has absolutely no means or resources from which to pay the said money thus due from it and no property upon which it can give security to raise said money either for the purpose of liquidating its said indebtedness or continuing the operation of its said plant. That said defendant is absolutely insolvent, and without the funds, means or money with which to continue the operation or to maintain its said waterworks and water service system or any part thereof, or to even care for or preserve said waterworks and water service system or any part thereof. That said water plant must be kept in operation so as to furnish the town of Conrad and its inhabitants a water supply for municipal and domestic purposes and for fire protection. That in order to do this requires constant care and attention and constant supervision and the expenditure of a considerable amount of money daily in order to pump and supply sufficient water for delivery through the mains of defendant corporation for the benefit of the general public living [87] at and in the vicinity of Conrad,

Montana. That the entire value of defendant's plant and water service system consists in its being maintained and operated in good condition and repair; that if its operation should cease as an unavoidable result the Town of Conrad and the inhabitants thereof will be deprived of water to operate or flush its sewer or pumping system in the various homes, hotels and public buildings there so that great and irreparable loss and injury would result, not only to the defendant corporation but to the public at large. That unless said plant of defendant, Conrad City Water Company, is thus operated and unless it continues to deliver water under its various contracts with the Town of Conrad and the owners of buildings therein and the inhabitants thereof said water service system will be materially injured and depreciated in value and rendered virtually valueless and this plaintiff will be deprived of the only security upon which it has a lien and the only property and assets upon which it can assert a valid claim for reimbursement of the moneys thus due plaintiff as Trustee aforesaid, and the various bond holders and creditors of the company will be deprived of the only property from which they can hope to realize anything upon their respective claims.

Nineteenth. That the company's waterworks and water supply system is valuable only as a going concern because should it suspend operations the plant itself will be materially injured, depreciated in value and plaintiff's security impaired and rendered valueless and lost to this plaintiff and the very



franchise upon which the company operates and which is its principal asset will become subject to forfeiture or revocation by the Town Council of the Town of Conrad, and will become valueless to plaintiff and defendant as well, thereby depriving plaintiff and the various bond holders of the property upon which the plaintiff has a lien for the satisfaction of its aforesaid claims. That [88] unless the Company's said water plant is kept in operation defendant will be exposed to innumerable suits and claims for damages from the various property owners and inhabitants of the Town of Conrad, who are absolutely dependent upon the company's said plant for water supply to protect their property against loss and destruction by fire and to protect the health and welfare of themselves and all people residing within or visiting the town of Conrad. That in the event that the said Conrad City Water Company even temporarily suspended its operations, hundreds of people depending upon it for water supply will be instantly deprived of water and be irreparably damaged and will sustain great and irreparable loss and great suffering and want, and said defendant will become liable to its water users for damages thus caused by suspending its said operations of its said water system.

Twentieth. That said defendant, Conrad City Water Company, is obliged by its aforesaid franchise with the Town of Conrad to furnish water to said Town and the inhabitants thereof and all its assets consist of said franchise and said water plant. That there are hundreds of home builders absolutely

dependent upon the water supply to be furnished and now being daily furnished by the Company and unless a receiver has charge of the Company's property, the pumping, carrying and delivering of water to said settlers and home builders will be suspended forthwith to their great loss and detriment. That to permit defendant, Conrad City Water Company, because of its insolvency to even temporarily suspend the pumping and delivering of water or to fail to furnish or deliver water through its said system or to delay in delivering the water in accordance with the vested rights of the homebuilders and property owners of Conrad and the multitude of inhabitants thereof who are resident tax payers within the State of Montana, and to expose their property to loss or destruction by fire because of the failure of the Company to promptly deliver said [89] water, would be a public calamity and would bring almost unending loss and want upon innocent settlers and homebuilders. That all this can be avoided by a receiver having charge of the assets and property of the defendant, Conrad City Water Company, and that unless a receiver of this Honorable Court is thus continued in the custody and control of the company's assets, the maintenance and operation of the said water plant will cease and be suspended because of the Company's lack of credit and funds and inability to raise funds with which to maintain its said water plant or continue the operation thereof or even to preserve said plant and pipelines and water service system from great depreciation, loss and injury.

Twenty-first. That the nature and scope of the corporate purposes for which defendant, Conrad City Water Company, was formed are such, and the object and purpose of its franchise from the Town of Conrad are such, and its innumerable contracts for the delivery of water to the multitude of owners and occupants of property at and in the vicinity of Conrad, Montana, are such that the defendant, Conrad City Water Company, is a *quasi*-public corporation and its purposes and objects are public utilities of an exceedingly high character, and accordingly the work of maintaining and operating the said water system and repairing the same and if necessary enlarging and increasing its capacity so as to serve the public at large advantageously are of such vital importance to the State of Montana, and its citizens at large as to justify this Honorable Court as recognizing said Conrad City Water Company as belonging to that class of public service enterprises for whose preservation on behalf of the general public, the exercise of the highest degree of power by the court of equity is justified and required by a public policy of this state as evidenced by its constitution and codes and that unless a receiver by this Honorable Court duly appointed [90] is forthwith empowered to have immediate charge of defendant corporation, Conrad City Water Company, and all its assets and administer upon the same and maintain and operate said water service system the same will become a loss to all parties in interest and will be the cause of loss and suffering to the innocent homebuilders and settlers dependent upon defendant



for water supply, for domestic uses and fire protection and for sewer flushing, and will work irreparable injury to the community at large.

Twenty-second. That the affairs of the Conrad City Water Company because of its insolvency are in a chaotic condition and it is impossible for defendants to continue operating except under a receiver. That to preserve and protect said plant from great loss, damage and detriment further expenditures must be made thereon, but defendant, Conrad City Water Company, has absolutely no means of raising funds to thus protect its said plant or repair or improve the same except through a Receiver of this Honorable Court, and unless such repairs and improvements are made promptly the water supply of said Defendant corporation will cease to become available to the town of Conrad or its inhabitants, and the corporation must cease to operate. Plaintiff alleges that it will require the immediate expenditure of at least \$1500 to continue the operation of the Company's plant and further expenditures will undoubtedly become necessary to preserve said plant and the property upon which plaintiff as Trustee has its lien from great loss and material depreciation in value. That there is absolutely no way for defendant corporation to thus protect and preserve its property or continue its operations of its said water service system except through the efforts of a receiver, and accordingly it is imperatively necessary that a Receiver have charge of the assets and property of said defendant, Conrad City Water Company. That in

order to protect the property of various tax-payers of Conrad from great loss and destruction and to maintain said [91] defendant's plant and protect it from depreciating and being materially injured, the appointment of a receiver for defendant is an imperative necessity, since defendant is financially unable to continue its operations of its said water service system or even to maintain the same or protect it from great loss and depreciation except through Receivership.

Twenty-third. That Conrad City Water Company is without funds to continue the operation of its plant except through a Receivership and unless in Receivership said defendant Company must suspend its operations and the maintenance, care and protection of its assets and property and particularly its water plant and water service system, and unless a Receiver is continued in charge of the affairs of said defendant company there will be a multicplicity of suits and litigation against said defendant Company and innumerable damage claims which will utterly ruin Conrad City Water Company, waste and squander its assets and permit the same to be materially injured, dissipated and rendered valueless to this plaintiff and the various bondholders who are owners and holders of bonds mentioned and described in and secured by said Mortgage or Deed of Trust hereby sought to be foreclosed, and the various other creditors and all other parties interested in Conrad City Water Company, so that plaintiff will lose the property upon which it has its foresaid mortgage lien, which property

if administered upon a receiver will ultimately yield sufficient money to pay a substantial dividend upon the indebtedness secured by said mortgage, and partially satisfy said debt. That except through a receivership the property of said Conrad City Water Company in its present condition cannot be made to yield any revenue or income and plaintiff's claim will become a loss. That the property subject to the lien of said mortgage or Deed of Trust is in imminent danger of being lost, materially injured, depreciated in value and rendered valueless to this [92] plaintiff as Trustee and all parties interested in the affairs of Conrad City Water Company unless a Receiver is forthwith placed in charge of said Conrad City Water Company and the careful and skillful efforts of a Receiver in charge of said property and assets are necessary and proper in order to preserve and protect all of said property and rights from great depreciation in value and loss and to prevent irreparable injury to this plaintiff and the holders of the bonds referred to in said Mortgage and also to the creditors of and all persons and corporations interested in the property, rights and affairs of said defendant Conrad City Water Company, and especially the customers and users of water from said Company, and for the like purpose and *end* the services of a Receiver will continue to be necessary until after the termination of this suit.

Twenty-fourth. That because of the matters and things hereinbefore alleged and fully realizing the necessity therefor this Honorable Court has heretofore by its order and decree duly given, rendered,



made and entered in that certain cause wherein Conrad Mercantile Company was named as plaintiff said Conrad City Water Company was named as defendant in Case No.     pending on the files of this court, to which said case reference is hereby made and the pleadings in which said case are hereby referred to and made part of this cause, the same to all intents and purposes as if set forth at length, duly appointed a receiver to take charge of all the property and assets of said Conrad City Water Company, a copy of which said order so appointing said receiver is hereto annexed, made a part hereof and marked Exhibit "B." That it is imperatively necessary that said receiver, or some equally competent person continue in charge and possession of all the assets and property of Conrad City Water Company as receiver pending this litigation in order to preserve and protect the said property and assets and that said [93]. Receivership to be thus continued and the said Receiver heretofore appointed in said prior action be appointed, designated as Receiver herein and directed to continue his said Receivership of said property and assets for the benefit of this plaintiff as Trustee, the Bondholders of Conrad City Water Company, and all the creditors of and all persons and corporations interested in the property, rights and affairs of said Conrad City Water Company.

Twenty-fifth. That the defendants Conrad Mercantile Company and Pacific Coast Pipe Company have, or claim to have, some interest in the property covered by the lien of the aforesaid mortgage or

Deed of Trust as subsequent incumbrances thereon, but the interest of said defendants Conrad Mercantile Company and Pacific Coast Pipe Company is in all respects, subject, subordinate and inferior to the lien of plaintiff's said Deed of Trust.

Twenty-sixth. That prior to the commencement of this action no proceeding at law or in equity for the recovery of the indebtedness secured by said mortgage or Deed of Trust, or any part thereof, principal or interest, has been had or taken, and that none of the holders of the said bonds or coupons has taken or caused to be taken any proceedings for the recovery of said indebtedness represented thereby, or any part thereof.

Twenty-seventh. That plaintiff has not assigned or transferred its interest in the aforesaid mortgage or Deed of Trust or any part or portion thereof and at all times since the acceptance of said trust plaintiff has continued to own and hold a valid mortgage lien upon all the property and assets mentioned and described in said mortgage or deed of trust to secure the aforesaid bonds, and has in all respects continued to perform and now performs its duties as Trustees thereunder.

Twenty-eighth. Plaintiff alleges that it has been obliged [94] to employ counsel to represent it in the administration of its said trust and to prepare and prosecute this action, and alleges that the sum of \$5,000 is a reasonable sum to be allowed plaintiff as and for attorneys' fees for the prosecution of this action upon said Mortgage or Deed of Trust.

WHEREFORE plaintiff prays for judgment

against the said defendants as follows:

1. That plaintiff may have judgment against said defendants Conrad City Water Company for the amount due upon said bonds, to wit, \$80,000 principal and \$9,600 interest, together with interest on \$82,400 thereof at the rate of six per cent per annum from January 1st, 1915, on \$2,400 thereof from July 1st, 1913; on \$2,400 thereof from January 1st, 1914, and on the remaining \$2,400 thereof from July 1st, 1914, also for such sum as this Honorable Court may deem reasonable to be allowed plaintiff as and for attorneys fees for the prosecution of this action upon said Mortgage, or Deed of Trust.

2. That a Receiver may be appointed to take immediate possession of all of the assets and property of said Conrad City Water Company, and all the property, rights, interests and franchises now subject to the lien of said Mortgage or intended so to be, and of the income, earnings, rents, tolls, issues and profits thereof; and that said Receiver may be empowered and directed to take, hold and possess the same and have exclusive charge and control thereof, with the usual powers of Receivers in like cases, subject only to the order of this Court. That such Receiver be directed to operate and manage the said properties and franchises; to pay out of the earnings thereof all necessary operating expenses; to keep the properties, machinery and equipment and appurtenances in repair; to apply the earnings as directed by the court, and otherwise to discharge all conditions ordinarily imposed upon Receivers of similar properties appointed [95] by the



Court. That the Company and all persons be directed and commanded to turn over, surrender and yield possession to such Receiver as may be appointed herein, and all of the said premises, properties, rights, interests and franchises subject to said mortgage.

3. That an account be taken of all the property subject to the lien of said mortgage, whether acquired before or after the execution and delivery thereof; that the company may fully disclose all the property and interest not hereinbefore sufficiently described and set forth which are conveyed or intended to be conveyed by said mortgage and may be compelled to convey and transfer to plaintiff by way of further assurance such of said properties and interests as have not been specifically conveyed or transferred.

4. That Conrad City Water Company, Conrad Mercantile Company and Pacific Coast Pipe Company and all persons claiming under Conrad City Water Company subsequent to the commencement of this action be absolutely barred and foreclosed of and from all right, title, lien, claim and equity of redemption of, in and to the said mortgaged premises and property and each and every part thereof; that the said mortgaged premises and property may be sold according to law and the rules and practice of this court, to satisfy the amount now due and hereafter found to be due on the said bonds and coupons, and that so much of the said mortgaged premises and properties as constitute the waterworks system of the company, including all easements,

right of way and lands which are occupied by the reservoirs, canals, laterals, aqueducts, pipes, pipelines, syphons, ditches or other water mains or works and all rights of access and other rights appertaining thereto and growing out of or used in connection therewith, to be sold without any right of redemption. That out of the moneys arising from the sale of the mortgaged premises and property, plaintiff be paid first, the costs, expenses and allowances of this action, including the reasonable compensation of plaintiff and its attorneys, [96] counsel and agents; and second, the amount found due on said bonds and coupons, with interest to the time of such payment so far as the amount of moneys properly applicable thereto will pay the same, and that the company be adjudged to pay any deficiency that may remain after such application. That the said mortgage be decreed to be and to constitute a valid and subsisting lien upon the premises and property hereinabove described as now subject to the said mortgage and upon all other property which the company may have acquired subject to the lien thereof, and upon the reversions, remainders, rents, issues, income, product and profits thereof, and all estate, right, title, interest and claim whatsoever, as well in law as in equity, of the company in and to the same.

5. That plaintiff may become a purchaser at said sale; that the sheriff execute a deed to said purchaser; that said purchaser be let into immediate possession of the premises described on production of sheriff's certificate of sale therefor; that plaintiff may be permitted to have the rents, profits and in-

come of said mortgaged premises of the immediate possession thereof, and that the plaintiff may have such other and further relief in the premises as to the Court may seem meet and equitable.

PERRY D. TRIMBLE,  
Attorney for Plaintiff.

State of Montana,  
County of Cascade,—ss.

P. Kelly, being first duly sworn, on oath deposes and says that he is an officer, to wit, the president of the Pondera Valley State Bank; that he has heard read the foregoing complaint and knows the contents thereof, and the same is true of his own knowledge.

P. KELLY.

Subscribed and sworn to before me this 16th day of June, 1915.

[Seal] H. NORSKOG,  
Notary Public for the State of Montana, Residing  
at Great Falls.

My commission expires March 7, 1917. [97]

State of Montana,  
County of Teton,—ss.

I, James Gibson, Clerk of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, do hereby certify that the foregoing is a true and correct copy of Complaint in Intervention in the case of Conrad Mercantile Company, a corporation, vs. Conrad City Water Company, a corporation, Pondera Valley State Bank, as Trustee, Intervenor, now on file and of record in my office.



WITNESS, my hand and the seal of said court this 20th day of April, 1916.

[Seal]

JAMES GIBSON."

Thereupon the plaintiff, for the purpose of proving the date of levy of the writ of attachment upon which the judgment was recovered, offered to read from the original writ on file in Case No. 351 in this court, in which the Pacific Coast Pipe Company was the plaintiff and Conrad City Water Company the defendant, the return of the United States Marshal, which said return so read was in words and figures as follows, to wit:

**Return of U. S. Marshal to Writ of Attachment in  
Pacific Coast Co. v. Conrad City Water Co.**

"I do hereby certify that I received the writ of attachment hereto attached on the 7th day of November, 1913, and personally served same by delivering a copy thereof to M. S. Darling, President of the defendant corporation, Conrad City Water Company, at the office of said company in the city of Conrad, Teton County, Montana, on the 8th day of November, 1913; that I levied upon and attached all moneys, goods, credits, effects, debts due and owing, and all other personal property belonging to said defendant Conrad City Water Company in the possession or under the control of the Pondera Valley State Bank and the Municipal Construction Company; that I levied upon and attached all of the real property of said defendant Conrad City Water Company by filing a copy of this writ, together with a notice of attachment, describing said [98] real

property, in the office of the County Clerk and Recorder of Teton County, Montana.

Dated this 8th day of November, 1913.

WILLIAM LINDSAY,

United States.

By Thad C. Pound,

Deputy.

(Filed Nov. 14th, 1913.)

For the purpose of proving the date of the original indebtedness, or the note upon which the judgment in this suit was recovered, the plaintiff offered to read, and read, from the complaint attached to the judgment in Case No. 351, in which action the judgment in suit was recovered, the following allegation "That on the 7th day of February, 1911, the defendant, for value received, made, executed and delivered to the plaintiff its certain promissory note," describing the same.

Thereupon the plaintiff offered in evidence the alias execution issued in Case No. 351, of this court, Pacific Coast Pipe Company, plaintiff, vs. Conrad City Water Company, defendant. For the purpose of fixing the date of the several levies of execution, and the proceedings of the marshal under the execution, which said paper, omitting the title of court and cause, was in words and figures as follows, to wit:

**Alias Execution in Pacific Coast Pipe Co. v. Conrad City Water Co.**

The President of the United States of America, to  
the Marshal of the United States of America  
for the District of Montana, Greeting:

WHEREAS, on the 3d day of July, A. D. 1914,

the Pacific Coast Pipe Company, a corporation, recovered a judgment in the District Court of the United States, for the District of Montana, against the Conrad City Water Company, a corporation, for the sum of \$9,689.40, damages, and \$711.25 costs, together with interest thereon at the rate of eight per cent per annum from [99] date of said judgment until paid, as appears to us of record;

And, whereás, the Judgment-roll in the action in which said judgment was entered is filed in the clerk's office of said court, and the said judgment was docketed in said clerk's office on the day and year first above written;

And, whereas, the sum of \$10,400.65, with interest thereon at the rate of eight per cent per annum, from the date of said judgment, is now (at the date of this writ) actually due on said judgment, together with the sum of \$3.10 accruing costs, also \$104.03, percentage at the rate of 1% upon the amount found due on the date of satisfaction of this writ;

NOW, you, the said marshal, are hereby required to make the said sums due on said judgment, with interest as aforesaid, costs, accruing costs, and percentage to satisfy the said judgment, out of the personal property of said debtor, or if sufficient personal property of said debtor cannot be found, then out of the real property in your district belonging to said debtor on the day whereon said judgment was docketed, or at any time thereafter, and that you have said money in said court, and return this writ within sixty days after your receipt thereof, with what you have done endorsed hereon.



WITNESS the Honorable GEORGE M. BOURQUIN, Judge of said District Court this 14th day of April, A. D. 1915, and of our Independence the one hundred thirty-ninth. Attest my hand and the seal of the said District Court the day and year last above written.

GEORGE W. SPROULE,

Clerk.

By C. R. Garlow,

Deputy Clerk.

Thereupon plaintiff rested. [100]

Whereupon defendants offered in evidence "Defendant's Exhibit 7," being the appearance made by the Conrad City Water Company, in the suit of Conrad Mercantile Company against Conrad City Water Company, which said paper in words and figures is as follows:

**Defendant's Exhibit 7—Appearance of Conrad City Water Co.**

[Title of Court and Cause.]

**APPEARANCE.**

Now comes Conrad City Water Company, a corporation, and offers its appearance in the above-entitled proceeding, and said corporation admits:

First. That defendant is a corporation organized and existing under and by virtue of the laws of the State of Montana.

Second. That said defendant corporation is now in fact insolvent and said corporation accordingly waives notice of plaintiff's application for the appointment of a receiver and hereby consents to the

appointment of a receiver as prayed for in the complaint on file herein.

Third. Defendant admits that plaintiff has a valid lien upon the property of defendant corporation as set forth in the complaint on file herein, and admits that the appointment of a receiver is necessary to protect the lien of plaintiff and the best interests of all parties concerned in the affairs of said corporation, both as shareholders, bondholders and general creditors.

CONRAD CITY WATER COMPANY.

By J. A. McDONOUGH,

Its Attorney.

CONRAD CITY WATER COMPANY.

By M. S. DARLING,

President.

Subscribed and sworn to before

J. A. McDONOUGH,

Notary Public.

(Duly verified.)

Thereupon defendant offered in evidence Exhibits "8" and "9," being the motion for the appointment of receiver in the suit of Conrad Mercantile Company No. 1407, and the order filed appointing a receiver. Both of which said papers are attached to [101] and made part of the answer of Conrad Mercantile Company and others in this action, and are not repeated herein for that reason.

Thereupon defendant offered to read in evidence Defendants Exhibits "10," "11," and "12," being, respectively, the petition of the Pondera Valley State Bank for leave to intervene in the suit of Con-

rad Mercantile Company against the Conrad City Water Company, the order granting the motion to intervene, and also the order granting the application of the Pondera Valley State Bank to file its foreclosure suit, which said exhibits are in words and figures as follows, to wit:

**Defendant's Exhibit 10—Petition of Pondera Valley State Bank for Leave to Intervene in Conrad Mercantile Co. v. Conrad City Water Co.**

[Title of Court and Cause.]

**PETITION FOR LEAVE TO INTERVENE.**

Now comes Pondera Valley State Bank, a Montana Corporation, as Trustee, and respectfully represents unto this Honorable Court that on or about August 26th, 1910, Conrad City Water Company made, executed and delivered to Pondera Valley State Bank, as Trustee, a Mortgage or Deed of Trust for the purpose of securing First Mortgage Six Per Cent Gold Bonds to the amount of \$80,000. That the corporation making said Mortgage or Deed of Trust is the same corporation of which the said James T. Stanford has been appointed Receiver. That bonds secured by said Mortgage or Deed of Trust amounting to \$80,000 have been issued and are now outstanding as legal, valid and binding obligations of the said Conrad City Water Company, and that said Conrad City Water Company has defaulted in the payment of the interest upon all of said bonds and has otherwise made default so as to entitle the said Mortgage to be foreclosed.

That said Mortgage or Deed of Trust creates a lien upon all the assets and property of Conrad City



Water Company prior and superior to the lien of Conrad Mercantile Company in the above-entitled action, and in order to preserve or protect the [102] rights of the bondholders who own and hold the bonds secured by said Mortgage or Deed of Trust, your petitioner asks leave to file a complaint in intervention in the above-entitled action, a copy of which said complaint and intervention is herewith tendered to this Honorable Court for inspection.

WHEREFORE, your petitioner prays that this Honorable Court may make its order granting to your petitioner leave to file in the above-entitled action its said complaint and intervention which is hereby tendered for filing.

PERRY D. TRIMBLE,

Attorney for Pondera Valley State Bank as Trustee.

(Filed June 23d, 1915.)

**Defendant's Exhibit 11—Order Granting Leave to Pondera Valley State Bank to File Complaint, etc.**

[Title of Court and Cause.]

ORDER.

Having read the application of Pondera Valley State Bank, as Trustee, for leave to file a complaint in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, for the purpose of foreclosing a Mortgage or Deed of Trust which was executed by Conrad City Water Company on August 26th, 1910, and having inspected and considered the said complaint which

it is proposed by the said petitioner to file in said foreclosure proceeding and it being proved to the satisfaction of this court that said petitioner is entitled to bring said suit, and that it is just, equitable and proper that said petitioner be granted permission to bring said foreclosure suit.

IT IS THEREFORE ORDERED, that the petitioner, Pondera Valley State Bank, as Trustee, be and it is hereby granted permission to file said foreclosure complaint in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, and to prosecute its said action against [103] said Conrad City Water Company and the other defendants named in said complaint for the purpose of foreclosing upon said Mortgage or Deed of Trust above referred to.

ORDER made and entered in open Court this 23d day of June, 1915.

H. H. EWING,  
Judge.

(Filed June 23d, 1915.)

**Defendant's Exhibit 12—Order Granting Motion of  
Pondera Valley State Bank to Intervene etc.**

[Title of Court and Cause.]

**ORDER GRANTING MOTION OF INTERVEN-  
TION.**

The complaint in intervention of Pondera Valley State Bank, as Trustee, having been this day presented to this court and leave asked in open court to file the same by counsel for Pondera Valley State Bank, the intervenor named therein, it appearing

that good cause exists therefor, IT IS HEREBY ORDERED that leave be and it is hereby granted to file the same and that the said Pondera Valley State Bank as Trustee be permitted to intervene in said cause.

Order made and entered in open Court this 23d day of June, 1915.

H. H. EWING,  
Judge.

(Filed June 12th, 1915.)

Thereupon defendant rested.

Thereupon, after argument by counsel, the case was submitted to and taken under advisement by the Court, and thereafter, on the 1st day of November, 1916, the Court rendered his decision, in words and figures as follows, to wit: [104]

[Title of Court and Cause.]

### Decision.

In this court in a law action *in personam*, plaintiff procured an attachment of the defendant Water Company's realty, and recovered judgment against said defendant for Nine Thousand Dollars (\$9,000). It brings this suit alleging that execution upon said judgment was fruitless in that intermediate judgment and execution a suit against said defendant was brought in a court of this State to foreclose a mechanic's lien for Fifty-four and 70/100 (\$54.70), wherein allegations of insolvency, chaos and probably damage to the lien claimant were made, resulting in the appointment of a receiver of all of said defendants' property, the receiver then and at all times



hitherto being in possession thereof. Other allegations are that the mechanic's lien is invalid or inferior to plaintiff's attachment; that the complaint therein was not sufficient to confer jurisdiction upon the State court to appoint a receiver; that the foreclosure suit was of a scheme to hinder and delay satisfaction of plaintiff's judgment, and that plaintiff's attachment and judgment are entitled to priority over an antecedent Eighty Thousand Dollar (\$80,000) bond issue of said defendant, security for antecedent debts.

The plaintiff in the foreclosure suit, the receiver, the trustee in the trust deed securing the bonds, a trustee [105] holding the bonds, and the latter's beneficiaries, are joined as defendants herein. The prayer is a decree establishing priority of said attachment and judgment, a receiver, and further relief.

Defendants deny lack of jurisdiction in the State court, deny invalidity and inferiority of the mechanics' lien, deny the alleged scheme, deny priority of plaintiff's attachment and judgment over the bond issue, and allege that subsequent to this suit the trustee in the trust deed in that behalf intervened in the mechanics' lien suit, sued to foreclose the trust deed, joining this plaintiff as defendant, wherein the Court extended the existing receivership to the latter suit; that by reason thereof the State court has "exclusive jurisdiction of all the affairs and assets" of the water company; and that the instant suit should abate for that it was instituted against the receiver without leave of the State Court.

These jurisdictional questions should have been presented to the Court *in limine*, but were not, and this suit has been tried on the merits. They have not been and could not be waived, in that even if parties consent a court will not knowingly invade this jurisdiction of another court. As these issues of jurisdiction are determined against plaintiff, the merits will be noticed no further than they ought to be under the circumstances and for possible review. Briefly, the aforesaid allegations of the complaint are found to be true, and plaintiff's attachment and judgment are entitled to priority over the bonds for that the latter are invalid, having been issued and now and at all times held to secure pre-existing debts, in violation of the Constitution of this State, wherein the Water Company is incorporated, that no corporate bonds shall issue "except for labor done, services performed, or money, or property, actually received." [106]

See Chavelle vs. Trust Co., 226 Fed. 408.

In re Paper Corp., 229 Fed. 489.

If this State Court receivership is void, if the receiver was appointed without jurisdiction, his possession would not be that of the State Court and would not effect jurisdiction herein.

See Hammock vs. Trust Co., 105 U. S. 86.

But although the mechanics' lien appears a fiction and the foreclosure and receivership for ulterior purposes, the suit was within the State Court's equity jurisdiction, and wherein a receiver could be lawfully, even if improvidently, appointed.

The otherwise sufficiency of the complaint and the

evidence before the State Court cannot be questioned here, but only in a court having power to review the State Court, which this court has not.

See *Shields vs. Coleman*, 157 U. S. 178.

*McKinney vs. Landon*, 209 Fed. 303.

The appointment was valid, and since a suit against the receiver, without leave of the State Court, is a trespass against said court upon which no right can be founded, this court will not entertain it.

See *Porter vs. Sabin*, 149 U. S. 480.

The receivership in the lien suit merged in that of the bond suit, and if the former suit is questionable in scope or jurisdiction, the latter is not, and the merger was without interregnum in the State Court's possession of the property in which the instant suit could attach. It is settled beyond controversy that for obvious reasons when property is in *custodia legis*, the court in possession is vested with optional exclusive jurisdiction to hear and determine all controversies affecting title, possession and control of the [107] property. Unless it consents to exercise of like jurisdiction by other courts, they are without such jurisdiction.

*Palmer vs. Texas*, 212 U. S. 129.

*Murphy vs. Co.*, 211 U. S. 569.

*Wabash Ry. vs. College*, 208 U. S. 54, 611.

Plaintiff's attachment of the Water Company's realty, by filing notice thereof with the recorder of the county of the realty's situs, created but a lien for security to pay the judgment.

See *Rounds vs. Foundry*, 237 U. S. 308.

It did not draw the realty into this court's custody,



and was no barrier to other liens and actual seizure by other courts. It is no more potent than a judgment lien, and even levy of execution upon land, without possession, does not bring the land in *custodia legis*, does not disable another court from subsequent receivership over it; and such receivership had, a sale upon such levy is void.

Wiswall vs. Sampson, 14 How. 52.

Heidritter vs. Elizabeth Co., 112 U. S. 303.

Hence said attachment did not disable the State Court to appoint and possess the property by a receiver. This court is without jurisdiction, and decree for defendants.

BOURQUIN, J.

And thereupon judgment was rendered accordingly.

COMES NOW THE PLAINTIFF and appellant in the above-entitled cause, and presents this, its statement of the case, and asks to have the same duly allowed, settled and signed as and for the statement of the proceedings in the said cause at the trial, and as containing all the evidence material to the hearing of the [108] appeal in said cause.

DAY & MAPES,

Attorneys for Plaintiff and Appellant.

**Order Certifying, etc., Statement of Evidence.**

THIS IS TO CERTIFY that the foregoing statement of evidence and proceedings in said cause is hereby allowed; and that it contains all the evidence material to the hearing of the appeal in said cause, and is hereby ordered filed.

Dated this 24th day of January, 1917.

BOURQUIN,

Judge.

Filed Jan. 24, 1917. Geo. W. Sproule, Clerk.  
[109]

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That on the 2d day of January, 1917, Petition for Appeal and Order Allowing same were duly filed and entered herein, being in the words and figures following, to wit: [110]

[Title of Court and Cause.]

**Petition on Appeal.**

To the Honorable GEORGE M. BOURQUIN, District Judge:

The above-named Pacific Coast Pipe Company, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 1st day of November, 1916, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the assignment of errors filed herewith, and prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

Dated January 2d, 1917.

DAY & MAPES,

Attorneys for Pacific Coast Pipe Co., Complainant  
and Appellant.

Appeal allowed upon giving bond as required by  
law for the sum of \$300.

Dated January 2, 1917.

BOURQUIN,

Judge.

Filed and Entered Jan. 2, 1917. Geo. W. Sproule,  
Clerk. [111]

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That on the 2d day of January, 1917, Assignment  
of Errors was duly filed herein, in the words and  
figures following, to wit: [112]

[Title of Court and Cause.]

### **Assignment of Errors.**

Comes now the plaintiff in the above-entitled cause  
and files the following assignment of errors upon  
which it will rely upon its prosecution of the appeal  
in the above-entitled cause, from the decree made by  
this Honorable Court on the 1st day of November,  
1916.

#### **I.**

That the United States District Court for the Dis-  
trict of Montana erred in holding that the said Dis-  
trict Court was without jurisdiction to determine the  
matters and things involved in said cause.

#### **II.**

That the United States District Court for the Dis-  
trict of Montana erred in holding that the District  
Court of the Eighth Judicial District of the State of



Montana, in and for the county of Teton, acquired exclusive jurisdiction to hear and determine all controversies affecting the title, possession and control of the property of the defendant Conrad City Water Company by reason of the proceedings set forth in the records on file [113] herein.

WHEREFORE the appellant prays that the said decree be reversed and that said District Court for the District of Montana be ordered to enter a decree reversing the decision of the lower court in said cause.

Dated January 2d, 1917.

DAY & MAPES,  
Attorneys for Appellant.

Filed Jan. 2, 1917. Geo. W. Sproule, Clerk.  
[114]

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Thereafter, on January 3, 1917, Bond on Appeal was duly approved and filed herein, in the words and figures following, to wit:

[Title of Court and Cause.]

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:  
The Pacific Coast Pipe Company, a corporation, as principal, and the Maryland Casualty Company, a corporation organized and existing under the laws of the State of Maryland, authorized to become surety on bonds and undertakings required by the laws of the United States, as surety, are held and firmly bound unto Conrad City Water Company, a corporation, Pondera Valley State Bank, a corporation,

Conrad Banking Company, a corporation, Conrad Trust and Savings Bank, a corporation, Conrad Mercantile Company, a corporation, James T. Stanford, Receiver, and Paris B. Bartley, Trustee, in the sum of Three Hundred Dollars (\$300), lawful money of the United States, to be paid to them or their respective executors, administrators and successors; for which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our successors and assigns by these presents. Whereas the above-named Pacific Coast Pipe Company has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree of the District Court for the District of Montana in the above-entitled cause.

Now, Therefore, the condition of this obligation is such that if the above-named Pacific Coast Pipe Company shall prosecute its said appeal to effect and answer all costs if it fail to [115] make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

In Witness Whereof, we have caused this instrument to be signed in our corporate names by our respective attorneys this 2d day of January, 1917.

PACIFIC COAST PIPE COMPANY,

By DAY & MAPES,

Its Attorneys.

[Seal] MARYLAND CASUALTY COMPANY,

LOUIS F. SCHROEDER,

Attorney in Fact.

T. A. MAPES,

Attorney in Fact.

The within bond is approved both as to sufficiency and form this 2d day of January, 1917.

BOURQUIN,  
Judge.

Filed Jan. 3, 1917. Geo. W. Sproule, Clerk.  
[116]

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Thereafter, on January 3, 1917, Citation was duly issued herein, which original Citation is hereto annexed and is in the words and figures following, to wit: [117]

*In the District Court of the United States, District  
of Montana.*

IN EQUITY.

PACIFIC COAST PIPE COMPANY, a Corporation,  
tion,

Complainant,

vs.

CONRAD CITY WATER COMPANY, a Corporation,  
tion, PONDERA VALLEY STATE BANK,  
a Corporation, CONRAD BANKING COMPANY,  
a Corporation, CONRAD TRUST & SAVINGS BANK,  
a Corporation, CONRAD MERCANTILE COMPANY,  
a Corporation, JAMES T. STANFORD, Receiver, and  
PARIS B. BARTLEY, Trustee,

Defendants.

**Citation on Appeal.**

United States of America,—ss.

To Conrad City Water Company, a Corporation,  
Pondera Valley State Bank, a Corporation,  
Conrad Banking Company, a Corporation, Con-  
rad Trust and Savings Bank, a Corporation,  
Conrad Mercantile Company, a Corporation,  
James T. Stanford, Receiver, and Paris B.  
Bartley, Trustee, GREETING:

You are hereby cited and admonished to be and appear at the Circuit Court of Appeals of the United States, to be held at the city of San Francisco, in the State of California, on the 2d day of February, A. D. 1917. Pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States for the District of Montana from a final decree signed, filed and entered on the 1st day of November, 1916, in that certain suit, being in equity No. 55, wherein the Pacific Coast Pipe Company is plaintiff and you are the defendants and appellees, to show cause, if any there be, why the decree rendered against the said [118] appellant, as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, United States District Judge for the District of Montana, this 3d day of January, 1917, and of the Independence of the United States the 141st.

BOURQUIN,

United States District Judge for the District of  
Montana.



Copy of the foregoing Citation on Appeal received this 4th day of January, 1917.

O. W. McCONNELL,  
Atty. for Defendants. [119]

[Endorsed]: No. 55. In the District Court of the United States, District of Montana. Pacific Coast Pipe Co., a Corporation, Complainant, vs. Conrad City Water Co., a Corporation et al., Defendants. Citation on Appeal. Filed Jan. 5, 1917. Geo. W. Sproule, Clerk. [120]

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Thereafter, on Jan. 11, 1917, Praeipe for Transcript was duly filed herein, in the words and figures following, to wit:

[Title of Court and Cause.]

**Praeipe for Transcript of Record.**

To George W. Sproule, Clerk of Said Court:

In the preparation of the record on appeal in the above-entitled cause, you will incorporate into the transcript the following papers and documents only:

1. The Bill of Complaint.
2. The Answer of the defendants Conrad City Water Company, Pondera Valley State Bank, Conrad Banking Company, Conrad Trust and Savings Bank, Conrad Mercantile Company, Paris B. Bartley, Trustee.
3. You will note in the transcript the filing of the answer of the defendant John T. Stanford, Receiver, and the fact that its allegations are in substance identical with those of the answers of the defendants set forth at length.

4. The Statement of the Evidence When Settled.
5. The Petition, Order and Bond on Appeal.
7. Citation on Appeal.

Dated January 11th, 1917.

DAY & MAPES,  
Attorneys for Appellant.

Service of foregoing praecipe and receipt of copy acknowledged this 11th day of January, 1917.

O. W. McCONNELL,  
Attorney for Defendants.

Filed Jan. 11, 1917. Geo. W. Sproule, Clerk.  
[121]

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Thereafter, on January 24, 1917, an Order Extending Time for Return of Citation was duly made and entered herein as follows, to wit:

[Title of Court and Cause.]

**Order Extending Time to March 5, 1917, for Return to Citation on Appeal.**

This matter coming on to be heard, upon motion of the plaintiff and appellant, by Messrs. Day & Mapes, its attorneys, for an extension of time for the return of the citation on appeal herein, and upon consideration of the motion and good cause appearing, it is ordered that the time for the return of citation on appeal in the above-entitled cause, which was heretofore made returnable on the 2d day of February, 1917, be, and the same is hereby, extended thirty days from the said 2d day of February, 1917, to the 5th day of March, 1917.

Done in open court this 24th day of January, 1917.

GEO. M. BOURQUIN,

Judge.

Entered Jan. 24, 1917. Geo. W. Sproule, Clerk.

[122]

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**Certificate of Clerk U. S. District Court to Transcript  
of Record.**

United States of America,  
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 122 pages, numbered consecutively from 1 to 122, inclusive, is a true and correct transcript of the pleadings, orders and decree, and all other proceedings in said cause required to be incorporated in the record on appeal therein by the praecipe of the appellant for said record on appeal, including said praecipe, and of the whole thereof, as appears from the original records and files of said court in my possession as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Forty-eight and 45/100 Dollars (\$48.45) and have been paid by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 8th day of February, A. D. 1917.

[Seal]

GEO. W. SPROULE,  
Clerk.

By C. R. Garlow,  
Deputy Clerk. [123]

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[Endorsed]: No. 2937. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Coast Pipe Company, a Corporation, Appellant, vs. Conrad City Water Company, a Corporation, Pondera Valley State Bank, a Corporation, Conrad Banking Company, a Corporation, Conrad Trust & Savings Bank, a Corporation, Conrad Mercantile Company, a Corporation, James T. Stanford, Receiver, and Paris B. Bartley, Trustee, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed February 13, 1917.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.





IN THE  
United States Circuit Court of Appeals  
FOR THE <sup>2</sup>  
NINTH CIRCUIT.

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PACIFIC COAST PIPE COMPANY, a  
Corporation,

Appellant,

vs.

CONRAD CITY WATER COMPANY,  
a Corporation, PONDERA VALLEY  
STATE BANK, a Corporation, CON-  
RAD BANKING COMPANY, a Cor-  
poration, CONRAD TRUST & SAV-  
INGS BANK, a Corporation, CON-  
RAD MERCANTILE COMPANY, a  
Corporation, JAMES T. STANFORD,  
Receiver, and PARIS B. BARTLEY,  
Trustee,

Appellees.

Filed

BRIEF FOR APPELLANT

MAY 1 - 1917

F. D. Monckton,  
Clerk.

E. C. DAY,  
THOS. A. MAPES,  
Attorneys for Appellant.

MESSRS. KERR & McCORD,  
Seattle, Wash.,  
of Counsel.

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IN THE  
United States Circuit Court of Appeals  
FOR THE  
NINTH CIRCUIT.

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PACIFIC COAST PIPE COMPANY, a  
Corporation,

Appellant,

vs.

CONRAD CITY WATER COMPANY,  
a Corporation, PONDERA VALLEY  
STATE BANK, a Corporation, CON-  
RAD BANKING COMPANY, a Cor-  
poration, CONRAD TRUST & SAV-  
INGS BANK, a Corporation, CON-  
RAD MERCANTILE COMPANY, a  
Corporation, JAMES T. STANFORD,  
Receiver, and PARIS B. BARTLEY,  
Trustee,

Appellees.

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BRIEF FOR APPELLANT

This is an appeal from a decree of the District Court of the United States for the District of Montana, dismissing the Appellant's bill of complaint for want of jurisdiction. (Tr. p. 48).

On May 14, 1915, Appellant filed in the District



Court of the United States, for the District of Montana, its bill of complaint against the Appellees to enforce a judgment obtained by it against the Appellee, the Conrad City Water Company, on the 2nd day of July, 1914, in an action against the Water Company in said District Court, in which a writ of attachment had been issued on November 3, 1913, and levied upon the real estate of the Water Company on November 7, 1913, by filing a copy of the writ with the County Clerk and Recorder of the County in which the real estate was situated, as provided by the Statutes of Montana. The bill of complaint (Tr. pp. 2-16), after setting forth the jurisdictional facts, the issuance of the writ of attachment, its levy and the recovery of the judgment, details the organization of the Conrad City Water Company by one Ben Hager, George H. Stanton and M. S. Darling. It then alleges that at the meeting of the incorporators, a resolution was passed accepting the offer of Hager to sell to the Company the entire water works system theretofore constructed by him, including franchises granted by the Town of Conrad, in exchange for the delivery to him of 99,980 shares of the capital stock of the Company, and \$70,000 in a note secured by an issue of bonds of the Company of the par value of \$80,000. That the shares of stock and bonds were issued and delivered to Hager, who thereupon turned them over to one W. G. Conrad, to be sold and out of the proceeds to pay the debts of the Company, without any exceptions. It is alleged that at the date of these

transactions, August 26, 1910, the Company was not indebted to either Hager or Conrad in any some whatever, nor had either of them made any advances to the Company in excess of the sum of \$51,000, which sum had been advanced by W. G. Conrad through the medium of Conrad Brothers, a partnership, the Pondera Valley State Bank, and the Conrad Townsite Company, which firm and corporations were controlled by the said W. G. Conrad. That on the 18th day of April, 1911, there was a meeting of the directors, at which a resolution was passed providing for the execution by the Water Company of notes to Conrad Brothers for the sum of \$48,275, the Conrad Townsite Company \$13,930, Pondera Valley State Bank \$5,419, and W. G. Conrad \$850, which notes represented the moneys advanced for the construction of the plant already represented by the notes delivered to Hager, and pretended to be secured by the deed of trust and bonds theretofore executed. That after the recovery of the judgment by the plaintiff, the Appellant herein, the officers of the Conrad City Water Company, turned the affairs of the Water Company over to the management of the officers in charge of the different companies hereinabove referred to, and that by means of suits to foreclose a mechanics lien of \$54.70, they had obtained possession of all of the property of the Company, through the appointment of the defendant James T. Stanford as Receiver. That by some means, to the plaintiff unknown, the bonds had come into the possession of

the defendant Paris B. Bartley, as Trustee, who was asserting some interest under and by virtue of the Trust Deed. That after the recovery of the judgment referred to in the complaint, and on the..... day of March, 1915, the Conrad Mercantile Company commenced an action in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, against the Conrad City Water Company, to foreclose a pretended mechanics lien for the sum of \$54.70, for supplies and materials furnished to the Water Company between the 1st day of September, 1914, and the 10th day of March, 1915. That in addition to the prayer for the foreclosure of the lien, there was a prayer for the appointment of a receiver upon the ground that the Conrad City Water Company was insolvent and its affairs in a chaotic condition, and that in order to protect the plaintiff from great loss and to enable the Company to supply the inhabitants of Conrad with water, it was necessary that a receiver be appointed to take charge of the assets of the Water Company. That upon the same day that the complaint was filed the Conrad City Water Company appeared and confessed the allegations of the complaint, and thereupon the Judge of the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, appointed the defendant James T. Stanford, receiver of the real and personal property of the Water Company, who immediately took possession of all of the property and held the same under his

control by virtue of his appointment as receiver. That the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton had no jurisdiction to appoint the receiver for the reason that the complaint in the action did not set forth facts sufficient to confer upon the court jurisdiction, and that the receivership was a part and parcel of the scheme entered into by the defendant Stanford and other officers of the Conrad City Water Company, with the intent to hinder and delay the plaintiff and appellant in satisfying the judgment hereinbefore referred to, out of the assets and property of the Water Company. That the pretended mechanics lien, if any, was not filed until March, 1915, and if valid at all, was subsequent and subject to the lien of the plaintiff and appellant upon the property of the Water Company obtained by the levy of the writ of attachment issued out of this court in the action in which the judgment herein sued on was recovered prior to the filing of the mechanics lien, and that the claims of the other defendants were also subsequent and subject to the lien of plaintiff's judgment.

Separate answers were filed by the corporation defendants and by Stanford, as Receiver, but as they were identical in terms, only the answer of the corporation defendants is inserted in the transcript. This answer raises, by proper denials, the issue as to the validity of the bonds, asserting that they were pledged to secure the indebtedness due the corporation defendants, and that the Pondera Valley State



Bank, as Trustee in the mortgage to secure the bonds, had commenced a suit in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, to foreclose the mortgage for the benefit of the defendant corporations, which suit is pending, and to which the Pacific Coast Pipe Company is a party defendant. The answer did not set forth the date of the commencement of the suit, but on the trial it appeared to have been subsequent to the filing of the bill of complaint in this action, and that no summons had been served upon the Pacific Coast Pipe Company. The answer also attempted to set up complete jurisdiction in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton over the affairs of the Company, and thus oust the District Court of the United States for the District of Montana of jurisdiction to hear and determine the facts pleaded in the bill of complaint. (For Answer see Tr. pp. 19-35).

On the trial, in addition to the evidence relative to the organization of the Water Company, the issuance of the bonds and the proceedings by which they came into the hands of Bartley as Trustee, and their sale as collateral to the indebtedness due from the Water Company to the different corporations, there were introduced copies of the pleadings in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton. These consisted of the complaint in the action to foreclose the mechanics lien (Tr. pp. 62-80), the

complaint in intervention of the Pondera Valley State Bank, as Trustee (Tr. pp. 81-108), and the appearance of the Conrad City Water Company therein (Tr. p. 112). Attached to the answer of the Conrad City Water Company were the orders appointing the Receiver in the case of the Conrad Mercantile Company, March 16, 1915, (Tr. p. 37), the order appointing the Receiver in the case of Pondera Valley State Bank against Conrad City Water Company, June 23, 1915, (Tr. p. 40), and the order extending the receivership in the Mercantile Company case on June 23, 1915, (Tr. p. 46). For the purpose of establishing the date of the levy of the writ of attachment in the action upon which judgment was recovered, the return of the Marshall was introduced (Tr. p. 109), showing the levy on the 7th day of November, 1913.

After hearing the testimony, the court rendered its decision, (see Tr. pp. 117-121), in which it held that the allegations of the complaint with reference to the bonds were found to be true, that the plaintiff's attachment and judgment were entitled to priority over the bonds because the latter were invalid, having been issued and held to secure pre-existing debts in violation of the Constitution of the State of Montana, but that the levy of the attachment by filing notice with the Recorder of the County in which the real estate was situated, created but a lien for security to pay the judgment, and did not operate to bring the property of the Water Company into the custody of the court. That the pos-

session by the State Court of the property by virtue of the appointment of the Receiver gave to the State Court jurisdiction to hear and determine all controversies affecting title, possession and control of the property. Accordingly, the decree was entered dismissing the action for want of jurisdiction. From this decree the appeal is taken, assigning as errors the holding of the court below that the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton acquired exclusive jurisdiction to hear and determine all controversies affecting the title, possession and control of the property of the Water Company by reason of the proceedings set forth. (Tr. p. 123).

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## ARGUMENT.

The Court below, in his opinion (Tr. p. 119) lays down the correct rule for the determination of the question of jurisdiction, in the following words:

“If this State Court receivership is void, if the receiver was appointed without jurisdiction, his possession would not be that of the State Court and would not affect jurisdiction herein.”

## NO JURISDICTION IN STATE COURT.

The complaint in the action of the Conrad Mercantile Company against the Conrad City Water Company sets forth a cause of action to foreclose a mechanics lien for \$54.70, for materials and sup-

plies furnished, and prays for a judgment and order of sale. But in addition there are the allegations (Tr. p. 66) of the existence of the trust deed and that the company was unable from lack of means to carry on its business of supplying the inhabitants of the town of Conrad with water, and paying its debts, which are alleged to be about \$96,000. Neither the trustee in the trust deed nor this plaintiff was made a party. Under the Statute of Montana the plaintiffs lien for the trivial amount of the cost of the materials (\$54.70) was superior to the lien of the trust deed or any other lien, at least to the extent of the structure in which they were incorporated. Section 7295 Revised Codes provides as follows:

“The liens attach to the buildings, structures or improvements for which they were furnished, or the work was done in preference to any prior lien, incumbrance or mortgage upon the land upon which said buildings, structures or improvements are erected; and any person enforcing such lien may sell the same under execution and the purchaser may remove the property sold within a reasonable time thereafter.”

No facts are alleged as grounds for the appointment of a receiver to take possession of the entire assets of the Company, except the fact of insolvency. No allegations are made tending to show in what manner the subjection of the Water Company's property to pay a debt of \$54.70 could interfere with its public duty of supplying water to the in-



habitants of the Town of Conrad, assuming that the lien claimant could have asserted such facts.

The Supreme Court of Montana has decided several times that the fact of insolvency of a corporation is not sufficient to justify the appointment of a receiver at the instance of a lien creditor, and that where no other ground is disclosed the proceedings are *void* and the appointment may be collaterally attacked.

The following language of the court in the case of *Berryman vs. Billings Mutual Heating Co.*, 44 517; 121 Pac. 280, is interesting upon this point. (Quoting from 121 Pac. 283):

“A Court of law has not any authority to appoint a receiver of property under attachment for the sole purpose of preserving the property and continuing the business of a defendant pendente lite. The function of a court of law is to subject the property attached to the payment of the plaintiff's claim as expeditiously and inexpensively as possible.

“The fallacy of the notion that mere insolvency is sufficient to justify the appointment of a receiver is disclosed when we consider that an insolvent individual under the same circumstances, would have no such protection as that afforded the defendant in this case, or would be subjected to no such hardship, as the case may be. The result of that line of reasoning is that a receiver may be appointed because the defendant is a corporation. Our attention is called to the fact that the defendant consented to the appointment. Even so, such consent did

not confer jurisdiction. If a receiver can be appointed for an insolvent corporation by consent, one may also be appointed without consent and against the best interests of a corporation, whose officers, presumably familiar with its business, might, if unmolested, succeed in making it solvent. If a receiver may be appointed in an action to recover \$5,000, one may also be appointed in a case involving \$25, when, perchance, garnishment of a bank account or seizure of some small article of personal property would be amply sufficient to insure the payment of the plaintiff's claim. It would be a most dangerous doctrine to hold that a receiver can be appointed for a corporation in an action to recover a simple contract debt, merely because the defendant is insolvent.

"The fact, noted in some of the cases cited by the respondent, that, under our Code system of practice, law and equity are administered by the same court, is, in our judgment, entirely beside the question.

"In our opinion, the order appointing a receiver was a nullity and can be attacked collaterally. *State ex rel. Jonston v. District Court*, 21 Mont. 155; 53 Pac. 272, 69 Am. St. Rep. 645. See, also, *Smith v. Superior Court*, 97 Cal. 348, 32 Pac. 322; *French Bank Case*, 53 Cal. 495."

To the same effect are the following Montana cases:

*State Ex rel Johnston vs. Dist. Court*, 21 Mont. 155; 53 Pac. 272;

*Forsell vs. Pittsburg & Mont. Co.* 42 Mont.  
412; 153 Pac. 479.

These decisions of the Supreme Court of Montana upon the question of the jurisdiction of the State Court to appoint receivers for insolvent corporations in aid of lien creditors was binding upon the District Court of the United States.

It was argued in the court below that if the proceedings in the case to foreclose the mechanics lien were without jurisdiction, the defect was cured by the intervention of the Pondera Valley State Bank and the assertion of the rights under the trust deed and the extension by the receivership to that case—and this view was accepted by the Trial Judge (Tr. p. 120). But this ignores the fact that the Pondera Valley State Bank did not intervene until June 23, 1915 (Tr. p. 115), which was after the commencement of this action on May 14, 1915, after the service of summons herein (see original summons) and but three days before the filing of the answer of the corporation defendants herein. Can a more flagrant effort to oust the Federal Court of jurisdiction to carry into effect its processes be conceived? The right of the mechanics lien claimant to a lien did not accrue until long after appellant's attachment lien had ripened into a judgment lien. Neither the appellant nor the Pondera Valley State Bank were made parties to the suit in which the Receiver was appointed. The only right the Receiver could assert in behalf of the mechanics lien claimant as

against this appellant would be the right to withhold so much of the property as would satisfy the claim of the mechanics lien, which was prior to the lien of plaintiff's judgment if it was prior. The Pondera Valley State Bank, not having been made a party to the suit in the State Court until after the action at bar had been commenced could not date its rights back to the commencement of that action. Even if the Federal Court had no jurisdiction over the Conrad Mercantile Company in asserting its claim secured by the mechanics lien, it did acquire jurisdiction to determine the controversy between appellant and those claiming under the trust deed, because the suit at bar was commenced first.

#### JURISDICTION OF FEDERAL COURT PRIOR IN POINT OF TIME.

The trial judge erred in holding that the levy of the plaintiff's attachment did not bring the property of the Water Company under the exclusive jurisdiction of the Federal Court, so as to enable it to enforce by proper proceedings the collection of the judgment afterwards rendered by it.

The issuance and levy of the writ of attachment in the suit to recover the judgment set up in the bill of complaint was sufficient to give this court jurisdiction of the affairs of the Conrad City Water Company, which jurisdiction could not be taken away from it by any proceedings of the State Court.

*Beardslee v. Ingram*, 148 N. Y. 411; 76 N. E. 476; 3 L. R. A. (N. S.) 1073.



It is immaterial whether the proceedings in which the receiver was appointed are void or not. The writ of attachment was issued and levied on the 7th day of November, 1913. The suit in which the receiver was appointed was not commenced until after the judgment had been obtained in this action, and in fact, after the writ of execution had been issued and levied. In the case of *Beardslee v Ingram* (Supra), we have almost an identical state of facts, except that the plaintiff in the attachment suit upon obtaining judgment, was proceeding to sell under his writ of execution. The receiver appointed in a suit commenced in the State Court after the attachment was levied, brought a suit to enjoin the Marshal from selling under the execution. The attachment was levied upon real estate in the same manner as in the case at bar. The only difference between the two cases is that in the *Beardslee v. Ingram* case the receiver, upon taking possession, brought suit to restrain the execution, whereas, in the suit at bar the plaintiff is seeking to compel the receiver to deliver up possession to the Marshall that the property may be sold under the process of this court, the lien of which dates back to the levy of the writ of attachment. The following language of the court is interesting:—

“An injunction against a United States marshal, forbidding him from selling under an execution issued out of the circuit court of the United States, is in effect an injunction against

the Federal tribunal itself. *Central Nat. Bank vs. Stevens*, 169 U. S. 432, 463, 42 L. ed. 807, 818, 18 Sup. Ct. Rep. 403, and cases there cited. In that case a part of the decree of the state court under review sought to restrain the complainants in a suit in the United States circuit court from proceeding under the final decree of sale in the United States circuit court, and from enforcing the other remedies adjudged to them by that decree. The granting of this injunction was condemned as erroneous by the Supreme Court of the United States. 'The injunction,' said Mr. Justice Shiras, who wrote the opinion of the court, 'was a plain interference with the proceedings in another court which had full and complete jurisdiction over the parties and the subject-matter of the suit, and which jurisdiction had attached long before the suit in the supreme court (of the state) had begun.' State courts are expressly declared to be destitute of all power to restrain either the process or proceedings in the national courts. The general rule that there is no authority in the state courts to enjoin proceedings in the courts of the United States is laid down as distinctly as a judicial proposition can be declared, and the correctness of the conclusion finds ample support in the authorities cited. See *Peck v. Jenness*, 7 How 612, 624, 12 L. ed.. 841, 846; *Riggs v. Johnson County (United States exrel. Riggs v. Johnson County)* 6 Wall 166; 18 L. Ed. 768; 2 Story, Eq. Jur. Sec. 900; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019. In the case last cited (which was a reversal of *Re Schuyler's Steam Tow Boat Co.*, 136

N. P. 169, 20 L. R. A. 391, 32 N. E. 623) the question was whether it was within the power of a state court to restrain the libellants in a district court of the United States from prosecuting their libels, and the Chief Justice declared the general rule to be 'that state cannot enjoin proceedings in the courts of the United States,' and reviewed a large number of authorities sustaining that doctrine. Furthermore, it is 'a rule of general application that, where the property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court,, *Moran v. Sturges*, 154 U. S. on page 274, 38 L. ed. on page 981 and 14 Sup. Ct. Rep. on page 1024. This proposition is stated by Chief Justice Fuller to have been repeatedly affirmed by the Supreme Court of the United States, and was perhaps most clearly and explicitly enunciated by Mr. Justice Matthews in *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355, in explaining the questions decided in *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749. His language is as follows: 'The point of the decision in *Freeman v. Howe* supra, is that when property is taken and held under process mesne or final, of a court of the United States, it is in the custody of the law, and within the exclusive jurisdiction of the court from which the process has issued, for the purpose of the writ; that the possession of the officer cannot be disturbed by process from any state court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which

that jurisdiction is appointed to administer; that any person not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds while remaining in the control of that court; but that all other remedies to which he may be entitled against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, state or Federal, having jurisdiction over the parties and the subject-matter. And, vice versa, the same principle protects the possession of property, while thus held by process issuing from state courts, against any disturbance under process of the courts of the United States, excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States.

“The attachment which Mr. Ingraham sued out in the circuit court of the United States antedated any proceedings in the suit in the supreme court of this state which resulted in the appointment of the receivers. Assuming that there was a sufficient and legal levy of this attachment by filing it in the office of the clerk of the United States circuit court for the western district of New York, such levy was effective to give to the Federal tribunal exclusive



jurisdiction of the property, which could not be disturbed by the state courts, if a levy of an attachment upon real estate brings the property to which it relates constructively into the custody of the tribunal out of which the warrant is issued. The proposition of law which appears to have led the courts below to sustain the injunction under review is that the levy of an attachment upon real estate gives to the court from which the process issues neither actual nor constructive possession of the property, and hence that the court has not acquired such custody of the property, by virtue of the attachment, as to prevent its lawful seizure by the receivers of another court. This doctrine finds support in a decision rendered in 1896, by a district judge of the United States, sitting alone in the circuit court for the southern district of California. *Re Hall & S. Co.*, 73 Fed 527. It was adopted in order to uphold the title of receivers appointed by a Federal tribunal as against the claim under a levy of attachment issued out of the state court. The learned judge conceded that so far as personal property was concerned, taken by the sheriff under the levy of the attachment, his title was superior to that of the receiver; but he held that the same rule did not apply to real estate, inasmuch as the attachment gave only a lien upon the lands, without any apparent right to possession. I can see no logical reason for making an attachment under such circumstances effective to oust the jurisdiction of another court in the case of personal property, but ineffective to oust such jurisdiction in the case of real property. The

purpose of the law is the same in both cases,—to secure an appropriation of the attached property to the satisfaction of the plaintiff's claim in the event that he recovers judgment. I cannot find in the law of attachment anywhere any indication of an intent to make this remedy available to a plaintiff in case of personal property, so as to prevent its seizure by subsequent proceedings in another court, and to refuse the remedy in the case of real estate. No such intent can be reasonably inferred from the fact that the officer executing the process is not required or permitted to take actual possession of the land. By procuring the notice of attachment to be filed in the prescribed office the plaintiff has done what the law requires to entitle him to have the land applied to the satisfaction of the judgment, if he subsequently obtains a judgment. He accomplishes no more than this with reference to personal property, by the actual seizure of personal property under the levy of an attachment thereon; and it seems to me that, so far as any question of jurisdiction is concerned, the real estate, upon which an attachment has been levied, issued out of a Federal court, should be deemed to be constructively in the custody of that court for the purposes of the rule laid down by the Supreme Court of the United States in *Central National Bank v. Stevens*, *Moran v. Sturges*, and the other cases which have been cited.

“In addition to *Re Hall & S. Co.*, *supra*, the courts below seem to have relied largely on *Wisswall v. Sampson*, 14 How. 52, 14 L. ed. 322. In

that case there was an attempt by the plaintiff in ejectment to obtain possession of land under judgments of the circuit court of the United States, entered in 1840. There were levies by execution on these judgments in February and April, 1845, a sale under execution, and a deed executed to the purchase in August, 1845. The defense was based on a deed given on a sale of the land in 1847 by a receiver of the Alabama court of chancery, who had been in possession of the property since June 27, 1845, by virtue of a decree rendered in April, 1845, in a suit begun in 1843. While the judgments under which the plaintiff claimed were prior to the institution of the chancery suit in 1843, the levy under them was subsequent to the filing of the bill in the chancery suit, but prior to the appointment of the receiver. The Supreme Court of the United States held that the plaintiff in ejectment had obtained no title inasmuch as at the time of the sale under the executions the Alabama court of chancery was in possession of the premises by its receiver. The view of the court seems to have been that the appointment of the receiver related back to the time of the filing of the bill in the chancery suit, which was prior to the levy of the executions under the plaintiff's judgments. While this case seems to support to some extent the position of the respondents, the case at bar is distinguishable from it in one respect which seems to me essential. Here there was no filing of any bill in the suit in which the receivers were appointed by the state court before the levy of the attachment in the suit of Mr. Ingraham in the United States circuit

court. The action was not begun until long after the attachment had issued out of the Federal court. If in *Wiswall v. Sampson* it had appeared that the levy of the judgments obtained in the Federal court had been prior to the filing of the bill under which the receiver was appointed by the state court, it seems to me that it would hardly have been held that such levy was interrupted by the filing of the bill and the appointment of the receiver. The basis of the decision in *Wiswall v. Sampson* seems to have been that in a suit of such a nature as that in which the receiver was appointed by the Alabama court of chancery (a suit to set aside conveyances of land as fraudulent), jurisdiction attached at the time of the filing of the bill, and hence remained paramount in the state court until decree. The doctrine involved was the same as that asserted in *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.*, 177 U. S. 51, 44 L. ed. 667, 20 Sup. Ct. Rep. 564, where it was held that the filing of the bill in a mortgage foreclosure suit in the circuit court of the United States disabled an Illinois state court from proceeding with a suit instituted therein to prevent the foreclosure of the mortgage, in which suit the summons was served before the writ of subpoena in the Federal court, although not until after the bill therein had been filed. 'As between the immediate parties,' said the court, 'in a proceeding in rem, jurisdiction must be regarded as attaching when the bill is filed and process has issued, and where, as was the case here, the process is subsequently duly served, in accordance with the rules of practice of the



court.' Referring to the rule that the possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and, for the time being, disables other courts of co-ordinate jurisdiction from exercising like powers, Mr. Justice Shires observed: 'Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected.'

"If the view which has been taken of the scope and effect of the decision in *Wiswall v. Sampson* be correct, that case is not an authority in favor of the respondents. It may be noted that this court, in *Chautauqua County Bank v. Risley*, 19 N. Y. 369, 376, 377, 75 Am. Dec. 347, refused to follow it, if construed as denying the validity of a title acquired by sale under a judgment which was a legal lien upon the land sold prior and paramount to the title or possession of a receiver. In the opinion of the learned appellate division it is said that the doctrine of the *Chautauqua County Bank Case* in this respect was repudiated in *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400, 15 N. E. 65, but I can find no reference in the opinion therein to the

former case. Although, in *Walling v. Miller*, this court did hold that a sale of property made under an execution, without leave of the court, while the property was in the possession of a receiver, was illegal and void notwithstanding that the execution had been levied before the appointment of the receiver, the question presented here, whether proceedings under an execution relating back to an attachment levied before the appointment of receivers can be restrained by an equity suit subsequently instituted in another tribunal, was not involved or decided."

Inasmuch as the jurisdiction over the property of the Water Company was obtained by levy of the writ of attachment, the Federal Court retained exclusive jurisdiction to subject the property of the Water Company to the payment of the judgment. The complaint alleged and the answer admitted that the entire plant of the company was a unit and that to sever the real estate from the personalty would be injurious to the property. The levy of the writ of attachment upon the real estate was therefore a sufficient taking by this court to grant it jurisdiction as against the receiver appointed either in the action to foreclose the mechanics lien or in the action to foreclose the deed of trust.

See also, *Southern Bank & Trust Co. v. Folsom*, 75 Fed. 931.

Cooper v. Reynolds, 10 Wall 308;  
Buck v. Colbath, 3 Wall 334.

or  
of

the Water Company by the levy of the writ of attachment, the action at bar is a proceeding in rem, and at the time of the service of summons herein neither the Pondera Valley State Bank as Trustee, nor any of the creditor corporations had been brought under the jurisdiction of the State Court. The jurisdiction of the State Court could cover only the controversy then pending before it. This court by reason of the diversity of citizenship has jurisdiction as between appellant and the Pondera Valley State Bank, and those whom it represents, to try the validity of the bonds as against appellant's judgment lien.

The trial court has held that the deed of Trust, and the issue of bond were void as against the lien of the plaintiff's judgment. If the action of the trial court is to be affirmed, it will result in surrendering the possession of the property into the hands of parties, one of whom is asserting claims which are decreed to be void as against the plaintiff, and the other of whom has a claim for but \$54.70, which if it is a lien at all, can be satisfied by taking an infinitesimal part of the property in controversy and as to which it has a prior lien, if lien at all, to all of the parties between whom the real controversy exists. The rights of the party can be fully protected by a decree requiring the plaintiff to pay off the claim secured by the mechanics lien as a condition of the decree in its favor. We submit that the court below erred in holding that it had no jurisdiction, and that the order appealed from should be

reversed with directions to enter a proper decree in favor of appellant.

Respectfully submitted,

E. C. DAY,

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Attorneys for Appellant.

MESSRS. KERR & McCORD,

Seattle, Wash.,

of Counsel.





IN THE  
**United States Circuit Court of Appeals**

FOR THE 3  
**NINTH CIRCUIT**

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PACIFIC COAST PIPE COMPANY, a  
Corporation,

Appellant,

vs.

CONRAD CITY WATER COMPANY,  
a Corporation, PONDERA VALLEY  
STATE BANK, a Corporation, CON-  
RAD BANKING COMPANY, a Cor-  
poration, CONRAD TRUST & SAV-  
INGS BANK, a Corporation, CON-  
RAD MERCANTILE COMPANY, a  
Corporation, JAMES T. STANFORD,  
Receiver, and PARIS B. BARTLEY,  
Trustee,

Appellees.

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**BRIEF FOR APPELLEES**

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O. W. McCONNELL, D. MONTAGUE  
J. A. McDONOUGH,  
Attorneys for Appellees.

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**BRIEF FOR APPELLEES**

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THE FACTS IN THIS CASE ARE BRIEFLY  
THESE:—

BEN HAGER, obtained a franchise from the Town  
of Conrad, to construct a water supply system and sub-



sequently obtained a right of way for pipe lines, reservoir sites and springs for the water supply. Being a man of somewhat limited means, he had to apply to others for money with which to carry out the project.

To save confusion it may be stated that he carried on the business under the name of Conrad City Water Company, but no corporation was organized of that name until long after the plant was completed. Mr. Hager was then in the position of being the owner of the water plant and franchise, together with its office building in Conrad and after the Conrad City Water Company was legally incorporated, Mr. Hager made a proposition to transfer to it, his water works system in consideration of 99,980 shares of the capital stock of the Company, \$70,000.00 evidenced by a promissory note to be secured by \$80,000.00 par value Gold Bonds, the payment of which Bonds was to be secured by a first mortgage lien upon the property of the Company. By resolution of the stockholders, duly passed at a regularly called stockholders' meeting, it was resolved that the offer be accepted and that the Company deliver to Hager 99,980 shares of the capital stock of the Company, its note for \$70,000.00 and as security for the payment of said note or notes to have its bonds secured by mortgage on the property of the Company to the amount of \$80,000.00. (See Tr. pp. 50, 51 and 52).

Thereupon the said Ben Hager conveyed all the property and franchise to the Corporation, together with the office building in the Town of Conrad and the site thereof. It appears that instead of giving the

note directly to Ben Hager, the notes were executed and delivered directly to the persons and corporations who had provided Ben Hager with means and money to construct the water works system, to-wit:

Conrad Brothers	- -	\$48,275.00
Conrad Townsite Company		\$13,930.00
Pondera Valley State Bank		\$5,419.00
W. G. Conrad	- - - -	\$850.00

(See Tr. pp. 54 and 55.)

By reference to the testimony of Ben Hager (Tr. p. 58), it will appear that the notes executed by Conrad City Water Company correspond with the amount of money advanced by the various persons and corporations and used in the construction of the water plant, as shown on Transcript, p. 54.

The board of directors of the Corporation passed the resolution to issue these notes to pay for the plant and to turn over \$80,000.00 in bonds, secured by mortgage on the Company's property as security for the notes (Tr. pp. 54 and 55).

It thus appears that the Company acquired title to the property pursuant to Mr. Ben Hager's offer. Its resolution of acceptance, the issuance of the stock to Ben Hager and the execution and delivery of the notes directly to the persons and corporations who had furnished the money for the construction of this plant and the execution and delivery of the \$80,000.00 in bonds secured by mortgage, are sufficient to show title as aforesaid. It thus appears that the notes were issued only for the amount of money which was act-

ually borrowed and used to construct this plant and Ben Hager never received any compensation for the franchise issued by the Town of Conrad, the rights of way for the pipe lines, the reservoir sites and water supply or the office building in the Town of Conrad, save and except the shares of stock of Conrad City Water Company. Nor did he receive any compensation for his personal services rendered or personal expenses incurred in constructing said plant, save and except by sale of said plant to Conrad City Water Company, a Montana corporation (Tr. p. 58).

It appears that these bonds so pledged were thereafter sold on November 12th, 1913 (Tr. p. 58) to satisfy the indebtedness of these notes, but were bought in by Mr. Paris B. Bartley as trustee for the holders of said notes. Hence it may be said that the bonds are still held as security for the notes.

A proper proceeding has been commenced to foreclose the mortgage securing these bonds, by Pondera Valley State Bank, the trustee named in the Indenture of Trust, dated August 26th, 1910, and recorded in the office of the Clerk and Recorder of Teton County, Montana, on December 14th, 1910, in book 4B of Mortgages, page 148 (Tr. p. 32). All persons in interest are parties to that suit and all equities between them can be adjusted and the rights of all can be fully determined in that foreclosure proceeding.

Appellant, Pacific Coast Pipe Company, had a certain promissory note signed "Conrad City Water Company, by Ben Hager, Manager," bearing date February 7th, 1911, for the payment of \$8,748.55, with eight per

cent interest thereon and commenced an action *in personam* in the United States District Court for the District of Montana upon said note on October 16, 1913 (Tr. p. 3):

Appellant on November 8, 1913, caused the United States Marshal to file a copy of its writ of attachment and notice of attachment in the office of the Clerk and Recorder of Teton County, Montana, seeking thereby to attach certain real estate of Conrad City Water Company (Tr. p. 109).

On March 16, 1915, Conrad Mercantile Company commenced an action in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, against the Conrad City Water Company, to foreclose a valid and subsisting mechanic's lien, said case being No. 1407 on the files of said Court (Tr. p. 28). Such proceedings were had and taken before said State Court in said cause No. 1407; that on March 16, 1915, an order was duly made and entered by said District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, wherein and whereby Appellee James T. Stanford was duly appointed receiver of all and singular the real and personal property and assets of Conrad City Water Company (Tr. p. 37, Exhibit A). Appellee James T. Stanford duly qualified as such receiver and took immediate possession of all the property and assets of Conrad City Water Company, on March 16, 1915, and has since said date continued to act as such receiver, and to administer the affairs of said Water Company.



On June 23, 1915 after leave of Court first had and obtained, Appellee Pondera Valley State Bank, a corporation, as trustee duly commenced its certain action in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Teton, the same being case No. 1486 on the files of said Court, wherein Conrad City Water Company, Conrad Mercantile Company and Pacific Coast Pipe Company were named as defendants for the purpose of foreclosing that certain deed of trust securing the \$80,000.00 issue of bonds. Conrad City Water Company duly appeared in said action, and on June 23, 1915, an order was duly given, rendered and made by said District Court in said cause whereby the appointment of the receiver of Conrad City Water Company made by said Court on March 16, 1915, in said cause No. 1407 was extended to said cause No. 1486, and James T. Stanford was designated and appointed as receiver of all the assets and property of said Water Company (Tr. p. 40, Exhibit B).

Thereafter on June 23, 1915, Appellee Pondera Valley State Bank after leave of Court first had and obtained, duly filed in the District Court of the Eighth Judicial District of the State of Montana, in said cause No. 1407, its complaint in intervention claiming a lien upon all the assets and property of said Water Company prior and superior to the lien of said Conrad Mercantile Company by virtue of said mortgage and deed of trust, and thereupon and thereafter such proceedings were had and taken in said cause No. 1407, that by an order duly given and made, the said appointment

of James T. Stanford as receiver of the property, assets and effects of said Water Company was extended to said cause No. 1486 (Tr. p. 46, Exhibit C).

In the face of this receivership in the State Court, Appellant brings this action in the Federal Court praying for a decree establishing priority of its attachment and judgment appointing a receiver and further relief (Tr. p. 16).

There is not a scintilla of evidence anywhere in the record to indicate any fraud or even a lack of good faith upon the part of Ben Hager, W. G. Conrad or any of the incorporators of Conrad City Water Company or upon the part of Conrad Brothers, Conrad Townsite Company or Pondera Valley State Bank in advancing funds for the construction of the water plant. Nor is it alleged that at the time of these transactions the Conrad City Water Company was indebted to the Complainant, now Appellant, in any sum whatever.

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## ARGUMENT.

### JURISDICTION IN STATE COURT.

We deem it unnecessary to enter into a discussion with the learned counsel of the Appellant upon the question of the right of a State Court to enjoin, or in any way interfere with the process of the United States Court.

It is "a rule of general application that, where the property is in the ACTUAL POSSESSION of one

court of competent jurisdiction, such possession cannot be disturbed by process out of another court."

Morgan v. Sturges, 154, U. S. p. 247;  
38 L. ed. on page 981;  
14 Sup. Ct. Rep. on p. 1024.

From the foregoing it is apparent that the actual possession of either a State or Federal Court cannot be disturbed by process issued out of another court.

It appears from the pleadings and proof that on March 16, 1915, the State Court had by its receiver, James T. Stanford, taken actual physical possession of all the property of the Conrad City Water Company and at all times since has been and now is engaged in administering it through its said receiver, and unless the proceedings are void upon their face the United States Court would have no right to interfere with the jurisdiction or possession of the State Court.

The United States Court in which this suit is pending has not any of the property of Conrad City Water Company in its care, custody or possession and never had actual possession of any of the property of Conrad City Water Company.

Accordingly the Federal Court has not any jurisdiction sufficient to disturb the possession of the receiver appointed by the State Court.

There is no allegation of any levy of any execution or the taking possession of any of the Water Company's property by the Marshal or making any entry thereon. There is the bald allegation of an attachment, but sufficient facts are not stated to show the

issuance of a valid attachment or a valid levy thereunder. But if it were conceded that an attachment was duly and regularly issued and levied, that would not give the United States Court jurisdiction over the property. The Marshal has not taken possession of the real estate. He had no authority to do so under a writ of attachment. He could not take possession of the franchise. It is not pretended that he took possession of anything, but simply filed a copy of the pretended writ and notice in the office of the Clerk and Recorder of Teton County. Even if such proceedings constituted a valid attachment they would not give the Federal Court jurisdiction over, or custody of the property of Conrad City Water Company.

As was aptly said by the learned Judge of the trial Court: "Plaintiff's attachment of the Water Company's realty, by filing notice thereof with the recorder of the county of the realty's situs, created but a lien for security to pay the judgment."

See *Rounds v. Foundry*, 237 U. S. 308.

"It did not draw the realty into this Court's custody, and was no barrier to other liens and actual seizure by other courts. It is no more potent than a judgment lien, and even levy of execution upon land, without possession, does not bring the land in *custodia legis*, does not disable another court from subsequent receivership over it; and such receivership had, a sale upon such levy is void.



“Hence said attachment did not disable the State Court to appoint and possess the property by a receiver. This Court is without jurisdiction.”

There is no provision in the United States Statute defining the manner of issuing or serving or levying attachments. It is only by virtue of the power given by the State statute and whatever inherent power the Court may possess under the common law to issue an attachment, that a Federal Court, may issue an attachment.

Rule 26 of the United States District Court for the District of Montana provides that “attachments shall be governed by the laws of the State of Montana.” Now we turn to the statutes of Montana, and the decisions, to learn what is the effect of an attachment.

Section 6687 of the Revised Codes of Montana defines an attachment as a lien and prescribes when that lien shall take effect.

In the following Montana cases an attachment is held to be a lien.

- Wilson v. Harris, 21 Mont. 374;
- Montana National Bank v. Merchants National Bank, 19 Mont. 586;
- Palmer v. McMasters, 10 Mont. 390;
- Ryan v. Maxey, 14 Mont. 81;
- Holter v. Ontario Co., 24 Mont. 184-193.

When a judgment is obtained in an action in which an attachment has been issued, the attachment lien merges in the judgment. Then the party only has a judgment lien.

The United States statute does not provide that a

judgment in the United States Court shall constitute a lien upon land.

Section 6812 of the Revised Codes of Montana provides that a judgment in the United States Court shall become a lien upon land when a transcript thereof is filed in the office of the Clerk of the Court of the County wherein the land is situated. There is no allegation in the complaint that there was a transcript of the judgment filed in the office of the Clerk of the Court of Teton County. In the absence of a transcript of the judgment being filed in the office of the Clerk of the Court of the County in which the land is situated, the property is not affected, and property is not affected by an execution until an actual levy is made.

Montana Revised Codes, Sec. 6821;

Wyman v. Jensen, 26 Mont. 237;

Holter Hardware Co., v. Ontario Co., 24 Mont. 193.

The most that Pacific Coast Pipe Company can claim is that it has a lien upon certain real property of Conrad City Water Company by virtue of the alleged notice of an attachment.

We do not concede that Appellant has any valid lien upon Appellee's land but even if we assume, momentarily, that such an attachment lien existed, the alleged lien does not give the Federal Court jurisdiction of the property or prevent proceedings in the State Court to foreclose a lien by a mortgage or otherwise, or to sell the property under an execution issued out of a State court. It cannot be contended that an attachment lien is of any higher order than a judgment lien.

In fact, it is of a lesser degree because it is merged in the judgment lien and a lien of a higher order cannot be merged in one of lower order.

Can it be successfully contended that if a judgment were obtained in the United States Court and a transcript thereof filed and docketed in the office of the Clerk of the State Court of the County in which the land was situated, that such a proceeding would give the United States Court custody and possession of the property and effectually bar all proceedings in a State Court to foreclose a mechanic's lien, a mortgage upon the property, or any other action which would affect the title of the property, or the possession thereof or prevent the property from being sold under an execution issued out of a State Court upon a judgment duly made, given and entered in that Court against the owner of the property?

To ask this question is to answer it in the negative.

We believe a careful examination of the authorities demonstrates the rule to be that where property is actually TAKEN and HELD under process, it is in the custody of the law and within the exclusive jurisdiction of the Court from which the process has issued. That the possession of the officer cannot be disturbed by process from any other court; but in the case at bar, we maintain that there was no taking of any property of Conrad City Water Company into the possession of any Court until James T. Stanford was appointed receiver by the State Court.

Under the Montana practice and decisions, it is obvious that an attachment of real estate does not give

either the sheriff or the attaching creditor any right of possession of the attached realty.

As against all the world the real estate remains in the possession of the debtor until the period of redemption expires or until, in a proper case, such as the foreclosure of a mortgage or mechanic's lien, a receiver is appointed under the chancery power of the Court.

It cannot be disputed or denied that Conrad City Water Company was entitled to remain in possession and did in fact remain in possession of its real estate and all its other property until possession was surrendered to the receiver of the State Court on March 16, 1915.

If the contention of Appellant's counsel were correct, that the mere filing of an action at law in the Federal Court to recover a money judgment upon an alleged note and the issuance of a writ of attachment against the real estate of the debtor gave the Federal Court exclusive jurisdiction of the affairs and property of that debtor, such a rule would cast upon the Federal Court an unjust burden by requiring all future litigants to apply to that Court or remain without relief. In the case at bar, it would mean that Pondera Valley State Bank could not foreclose its mortgage upon the property of Conrad City Water Company because both are Montana corporations and neither would be entitled to sue the other in the Federal Court. Such a rule would deprive a mortgagee of his right to seek a foreclosure of any mortgage and the appointment of a receiver therein, in event of an attachment having



been issued from the Federal Court upon the mortgaged real estate of the debtor prior to the filing of the foreclosure action in the State Court. We maintain that no court has ever so held and in the logical course of events no court will ever so hold.

Obviously the fact that an action may be pending in the Federal Court against a Montana corporation to recover a money judgment and the further fact that a notice of attachment may have been filed against the real estate of that corporation cannot be held to impair or prevent any right of the mortgagee to seek foreclosure of his mortgage lien upon that real estate and obtain the appointment of a receiver in a proper case under the provisions of our Montana Code.

#### THE APPOINTMENT OF A RECEIVER IN THE STATE COURT.

It is contended that it appears on the face of the pleadings that the State Court had no jurisdiction to appoint a receiver. If that be true, then it is not necessary to waste time prosecuting an action to remove that receiver. His appointment is "a mere scrap of paper" and the proper thing for Appellant to do is to simply disregard it and to go on and sell the property. But the appointment of the receiver is not void. The Court had jurisdiction of the parties and of the subject matter. The receiver is not appointed in an action at law. He was first appointed in an action to foreclose a mechanic's lien, an equitable action. And that a court of equity has power to appoint a receiver in such

Smith on Receivership, pages  
Alderson on Receivers, Sect 1  
Simonton vs. Kelly, 1 Mont.  
Cook v. Gallatin N. R. Co.,  
Montana Constitution Article  
Stevenson v. Matteson, 13 Mc

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property during the pendency of the action. The Supreme Court held, and rightly too, that the Court in that action did not have jurisdiction to appoint a receiver and this because a Court of law does not possess that jurisdiction or power and for the further reason that the Plaintiff could have proceeded under his execution and sold the property, just as the Appellant in this case could have done.

If the levying of an attachment had given the Court jurisdiction of the property and the custody of it, the Court could have appointed a receiver to preserve and protect that property but the Court held and rightly too, that it did not have jurisdiction to do so. And yet the learned counsel for Appellant relies on that case and quotes from it, forgetting that it is against his theory that an attachment of property gives the Court jurisdiction of the property and that the Court becomes its custodian. The officer, in levying on real estate never takes it into his possession and never has possession of it to give the Court any possession or custody over the property.

Section 6698 of the Revised Codes of Montana, reads as follows:

“A receiver may be appointed by the Court in which an action is pending, or by the Judge thereof.

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable and where it is shown that the property or fund is in danger of being lost, removed or materially injured.

2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.

3. After judgment to carry the judgment into effect.

4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.

5. In cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency or has forfeited its corporate rights.

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

The complaint under which the receiver was appointed by the State Court is set out at length on

pages 62 to 80 of the Transcript and the Complaint in Intervention filed by Pondera Valley State Bank appears on pages 81 to 108 of the Transcript. The orders made and entered by the State Court appointing the receiver and extending this receivership to the foreclosure proceedings of Pondera Valley State Bank are set forth on pages 37 to 47 of the Transcript.

We respectfully submit that these pleadings conclusively demonstrate the necessity of a court of equity appointing a receiver for a quasi public corporation.

In this connection we beg leave to quote again from the decision of the learned Trial Judge: "The otherwise sufficiency of the complaint and the evidence before the State Court cannot be questioned here, but only in a court having power to review the State Court, which this Court has not.

See *Shields v. Coleman*, 157, U. S. 178;  
*McKinney v. Landon*, 209 Fed. 303.

"The appointment was valid, and since a suit against the receiver, without leave of the State Court is a trespass against said Court upon which no right can be founded, this Court will not entertain it."

See *Porter v. Sabin*, 149 U. S. 480.

"The receivership in the lien suit merged in that of the bond suit, and if the former suit is questionable in scope or jurisdiction, the latter is not, and the merger was without interregnum in the State Court's possession of the property in which the instant suit could attach. It is settled beyond controversy that for obvious reasons when property is



in *custodia legis*, the Court in possession is vested with optional exclusive jurisdiction to hear and determine all controversies affecting title, possession and control of the property. Unless it consents to exercise of like jurisdiction by other courts, they are without such jurisdiction."

Palmer v. Texas, 212 U. S. 128;

Murphy v. Co., 211 U. S. 569;

Wabash Ry. v. College, 208 U. S. 54, 611.

Conrad City Water Company is and was a quasi public corporation furnishing water for health and fire protection for a municipal corporation and its inhabitants, and we respectfully submit that a court of equity in the exercise of its jurisdiction is and was justified in appointing a receiver for this corporation under the allegations of the 10th, 11th, 12th, 13th and 14th paragraphs of the complaint of Conrad Mercantile Company. (See Tr. p. 72.)

We observe at page 23 of Appellant's brief that counsel for Appellant in his "complaint alleged and the answer admitted that the entire plant of the Company was a unit and that to sever the real estate from the personalty would be injurious to the property."

The materials furnished by Conrad Mercantile Company for which it claimed a lien under the Revised Codes of the State of Montana were furnished for the entire plant of Conrad City Water Company as a unit, and were obviously used upon various structures, improvements, pipe line and service pipes scattered over various parts or portions of the miles of pipe line and water supply system and equipment of Conrad City

Water Company, which Appellant concedes constitute a single unit. We maintain that Section 7295 Revised Codes of Montana can have no application to the lien of Conrad Mercantile Company, since this lien extended to the entire plant of the Water Company as a single unit, all of which plant was also subject to the mortgage lien of Pondera Valley State Bank as trustee. The removal of any part of this plant would impair the unit. Obviously, then, this section can apply only to cases where there is some "prior lien, encumbrance, or mortgage upon the LAND upon which buildings, structures and improvements are erected," since it permits the lien claimant to remove the particular building, structure or improvement to which his lien attaches. In the case at bar, Conrad Mercantile Company had a lien upon the entire water plant, which appellant claims is simply a single unit, and a separation of any part from the whole would manifestly impair the plant as a working unit and deprive the inhabitants of Conrad of water for health and fire protection. Moreover, it is apparent that the plant and property upon which this lien existed was at the time of the appointment of the receiver in danger of being lost or materially injured or destroyed, unless the receiver were appointed.

We respectfully submit that even a slight examination of the pleadings in this receivership proceeding will conclusively demonstrate that the interests of the public at large and particularly the health, property, and even the lives of the community dependent for water and fire protection upon the service of Conrad

City Water Company were involved in these receivership proceedings, and the State Court in the exercise of its general equity power would have been derelict in its duty had it refused the appointment of the receiver.

In fact the Appellant's counsel in his complaint makes an allegation which is sufficient to sustain the appointment of the receiver in this case about which it complains.

In paragraph 10 of the Bill of Complaint it is alleged that after the complainant recovered its judgment "the officers of the Conrad City Water Company abandoned their functions and turned the affairs of the Company over to the management of the officers in charge of the several corporations hereinabove referred to" (Tr. p. 11). If there ever was a case in which a receiver should be appointed it is one in which the officers of a corporation abandon their functions and abandon the property. In such case, it is the time for a court of equity to step in and appoint a receiver to take charge of and preserve the property.

It would appear from the brief of the learned counsel that the ground which he urges is the want of jurisdiction of the Court to appoint a receiver and that the United States Court had jurisdiction of the property. As we have heretofore shown, that view is erroneous. The appointment of a receiver cannot be attacked collaterally.

From the foregoing we respectfully maintain that the decree appealed from should be affirmed.

Respectfully submitted,

O. W. McCONNELL,

J. A. McDONOUGH,

Attorneys for Appellees.





United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Plaintiff in Error,

vs.

GERTRUDE WRIGHT and ORENE WRIGHT  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Defendants in Error.

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Transcript of Record.

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Upon Writ of Error to the United States District Court of the  
Southern District of California, Northern Division.

Filed

MAR 7 - 1917

F. D. Monckton,

Clerk.



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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SOUTHERN PACIFIC COMPANY, a Corporation,  
Plaintiff in Error,

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Southern District of California, Northern Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Answer .....	22
Assignment of Errors.....	98
Attorneys, Names and Addresses of .....	5
Bill of Exceptions .....	32
Bond for Removal .....	16
Certificate of Clerk of State Court on Removal..	21
Certificate of Clerk to Judgment-roll.....	31
Certificate of Clerk U. S. District Court to Trans- cript of Record .....	134
Citation on Writ of Error.....	4
Complaint .....	6
Demurrer .....	11
Instructions Requested by Defendant.....	78
Instructions to the Jury.....	71
Judgment .....	28
Names and Addresses of Attorneys.....	5
Notice of Petition for Removal.....	12
Order Allowing Writ of Error.....	127
Order Extending Time to March 1, 1917, to File Record and Docket Cause .....	136
Order for Removal .....	20
Petition for Removal of Cause to United States District Court .....	13

Index.	Page
Petition for Writ of Error .....	96
Praecipe for Certified Copy of Transcript of Record on Writ of Error.....	133
Supersedeas Bond on Writ of Error.....	129
TESTIMONY ON BEHALF OF PLAIN- TIFFS:	
BOLES, FLORENCE .....	61
Cross-examination .....	62
BRIDGES, JOHN .....	57
Cross-examination .....	59
CARGILE, WADE .....	62
Cross-examination .....	65
DILLON, O. E. ....	37
HESS, OSCAR THURMAN .....	48
Cross-examination .....	52
Redirect Examination .....	56
Recross-examination .....	57
TUCKER, FRED .....	32
Recalled .....	38
Cross-examination .....	42
Redirect Examination .....	46
Recross-examination .....	47
WRIGHT, MRS. GERTRUDE .....	66
Cross-examination .....	69
Verdict .....	28
Writ of Error .....	1

*In the District Court of the United States, Southern  
District of California, Northern Division.*

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Plaintiff in Error,

vs.

GERTRUDE WRIGHT and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Defendants in Error.

**Writ of Error.**

United States of America,—ss.

The President of the United States, to the Honor-  
able, the Judge of the District Court of the  
United States for the Southern District of Cali-  
fornia, Northern Division, GREETING:

Because in the record and proceedings, as also in  
the rendition of the judgment of a plea which is in  
said District Court before you, or some of you, be-  
tween the Southern Pacific Company, plaintiff in  
error, and Gertrude Wright and Orene Wright and  
Ora Wright, by Gertrude Wright, their guardian  
*ad litem*, defendants in error, a manifest error hath  
happened, to the great damage of said Southern Pa-  
cific Company, plaintiff in error, as by its complaint  
appears;

We, being willing that error, if any hath been,  
should be duly corrected, and full and speedy jus-  
tice done to the parties aforesaid in this behalf, do  
command you, if judgment be therein given, that



then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at the city and county of San Francisco, in the State of California, on the 28th day of December next, in the said Circuit Court of Appeals, to be then and there held, that the [4\*] record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, the 28th day of November, 1916.

[Seal] WM. M. VAN DYKE,  
Clerk of the District Court of the United States,  
Southern District of California, Northern Division.

Writ allowed:

OSCAR A. TRIPPET,  
Judge.

I hereby certify that a copy of the within Writ of Error was, on the 28th day of November, 1916, lodged in the clerk's office of the said District Court of the United States, in and for the Southern Dis-

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\*Page-number appearing at foot of page of original certified Transcript of Record.

trict of California, Northern Division, for the said defendants in error.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States, in  
and for the Southern District of California,  
Northern Division.

By R. D. Zimmerman,

Deputy Clerk. [5]

[Endorsed]: No. 71—Civil. In the District Court  
of the United States, Southern District of California,  
Northern Division. Gertrude Wright et al.,  
Plaintiffs, vs. Southern Pacific Company, Defendant.  
Writ of Error. Filed Nov. 28, 1916. Wm. M. Van  
Dyke, Clerk. By R. D. ZIMMERMAN, Deputy  
Clerk. [6]

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*In the District Court of the United States, Southern  
District of California, Northern Division.*

SOUTHERN PACIFIC COMPANY, a Corporation,  
tion,

Plaintiff in Error,

vs.

GERTRUDE WRIGHT and ORENE WRIGHT  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Defendants in Error.

**Citation on Writ of Error.**

United States of America,—ss.

The President of the United States to Gertrude Wright and Orene Wright and Ora Wright, by Gertrude Wright, Their Guardian *ad Litem*, and Messrs. Gallaher & Aten and Frank Kauke, Esq., Their Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, on the 28th day of December, 1916, pursuant to a writ of error on file in the clerk's office of District Court of the United States, in and for the Southern District of California, Northern Division, in that certain action, No. 71—Civil, wherein the Southern Pacific Company is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment given, made and entered against the said Southern Pacific Company in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable OSCAR A. TRIPPET, United States District Judge for the Southern District of California, and one of the judges of the District Court of the United States in and for the Southern District of California, Northern Division, this 28th day of November, 1916, and the Independ-

ence of the United States the one hundred and forty-first.

OSCAR A. TRIPPET,  
United States District Judge for the Southern District of California. [7]

Service of the within citation, and receipt of a copy thereof admitted this 1st day of December, 1916.

GALLAHER & ATEN,  
FRANK KAUCHE,

Attorneys for Defendants in Error. [8]

[Endorsed]: No. 71—Civil. In the District Court of the United States, Southern District of California, Northern Division. Gertrude Wright et al., Plaintiffs, v. Southern Pacific Company, Defendant. Citation. Filed Dec. 6, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [9]

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**Names and Addresses of Attorneys.**

For Plaintiff in Error:

L. L. CORY, Esq., 410-414 Cory Building,  
Fresno, California.

For Defendants in Error:

GALLAHER & ATEN, and FRANK KAUCHE,  
Esq., Fresno, California. [10]



*In the District Court of the United States of  
America, in and for the Southern District of  
California, Northern Division.*

No. 71—CIVIL.

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,  
Defendant. [11]

*In the Superior Court of the County of Fresno, State  
of California.*

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,  
Defendant.

### **Complaint.**

The plaintiffs complain of the defendant and al-  
lege:

#### **I.**

That said defendant is now, and at and during all

the times herein mentioned has been, a corporation duly organized and existing as such under and by virtue of the laws of the State of Kentucky.

## II.

That the plaintiffs Orene Wright and Ora Wright are minors, each of whom is under the age of 14 years; that the said Orene Wright is of the age of 13 years, and that the said Ora Wright is of the age of 11 years; that the plaintiff Gertrude Wright is the mother of said minors, and that at the beginning of this action said Gertrude Wright has made application to be appointed the guardian *ad litem* of said minors for the purpose of prosecuting and conducting this action, and that said application has been granted, and by an order of this Court duly given, made and entered herein, the said Gertrude Wright has been appointed and now is the duly qualified and acting guardian *ad litem* of the said Orene Wright and Ora Wright, minors, plaintiffs in this action. [12]

## III.

That on the 22d day of May, 1914, the defendant, Southern Pacific Company, a corporation, was in the possession of a certain railroad in the city of Selma, county of Fresno, State of California, commonly known as the Southern Pacific Railroad, together with the tracks and rolling-stock and other appurtenances thereunto belonging, and was, on the said 22d day of May, 1914, operating, maintaining and controlling the said railroad, and the locomotives, cars and other rolling-stock thereon, and said loco-

motives, cars and other rolling-stock were then and there propelled by steam.

#### IV.

That on the 22d day of May, 1914, one George R. Wright, a man 37 years of age, was riding on a certain automobile truck, and was traveling along and upon a certain street in the said city of Selma, which said street is known as an extension of Arrants Street, and the same crosses the track of the railroad aforesaid at a point between East Front Street and West Front Street, in the said city of Selma, and which said so-called extension of Arrants Street then and there was and for a long time theretofore had been and now is a public highway at such point of crossing. That as the said George R. Wright on said day, while so traveling on said extension of Arrants Street, attempted to cross said railroad track, and as he was then and there passing onto and attempting to cross said railroad track, the said defendant, through its agents and servants, then and there acting within the scope of their employment, so carelessly and negligently operated one of defendant's locomotives on said railroad, that said locomotive ran into and upon and collided with said automobile truck, in which said automobile truck the said George R. Wright was then and there riding, in consequence of which said George R. Wright was then and thereby thrown [13] violently from said automobile truck and he was then and there, solely by reason of the fault and negligence of the said defendant, maimed and killed.

#### V.

That the plaintiffs, Gertrude Wright, Orene

Wright and Ora Wright, are heirs at law, and are all of the heirs at law of said George R. Wright, deceased; that the plaintiff Gertrude Wright is 31 years of age, and is the surviving wife of said George R. Wright, deceased; that the plaintiffs Orene Wright and Ora Wright are children of the said George R. Wright, deceased; that the plaintiffs were at the time of the death of the said George R. Wright dependent upon him for support and maintenance, and were entitled to the continuous support, maintenance, society, comfort and protection at the hands of the said George R. Wright, and would now be entitled to and would receive from the said George R. Wright, were he now living, all such support, maintenance, society, comfort and protection, and of all which the plaintiffs and each of them have been and are deprived by the death of the said George R. Wright, as hereinabove alleged. That in his lifetime the said George R. Wright was a hard-working sturdy, robust man, and he was 37 years of age at the time of his death, and he was earning and capable of earning about \$200 per month in the business in which he was engaged at the time of his death, to wit, the draying and transfer business.

## VI.

That on account of the death of the said George R. Wright, so caused by the carelessness and negligence of the said defendant, as aforesaid, plaintiffs have suffered damages in the sum of \$35,000.



WHEREFORE, plaintiffs pray for judgment against the said defendant in the sum of \$35,000 and for costs of suit.

GALLAHER & ATEN,  
FRANK KAUCHE,  
Attorneys for Plaintiffs. [14]

State of California,  
County of Fresno,—ss.

Gertrude Wright, being duly sworn, deposes and says: That she is one of the plaintiffs in the above-entitled action; that she has heard read the annexed and foregoing complaint and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that she believes it to be true.

GERTRUDE WRIGHT.

Subscribed and sworn to before me this 4th day of May, 1915.

[Seal] IRVINE P. ATHEN,  
Notary Public in and for the County of Fresno, State of California.

[Endorsed]: 18,238. Filed May 4, 1915. D. M. Barnwell, Clerk. By Louis F. Ryan, Deputy. [15]

*In the Superior Court of the County of Fresno, State  
of California.*

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

v.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,  
Defendant.

**Demurrer.**

Now comes the defendant and does demur to the  
Complaint of the plaintiffs herein for the following  
reasons, to wit:

I.

That said Complaint does not state facts sufficient  
to constitute a cause of action against said defend-  
ant.

II.

That said Complaint is uncertain in this, in that  
it cannot be determined therefrom how, or in what  
respect, the defendant, or any of its employees, was  
negligent, or in what respect one of the defendant's  
locomotives was in any manner carelessly or negli-  
gently operated, or in what such carelessness or neg-  
ligence consisted.

L. L. CORY,  
Attorney for Defendant.

[Endorsed]: 18,238. Filed Jun. 4, 1915. D. M.  
Barnwell, Clerk. By Louis F. Ryan, Deputy. [16]

*In the Superior Court of the County of Fresno, State  
of California.*

No. 18,238.

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Notice of Petition for Removal.**

To the Above-named Plaintiffs, and to Messrs. Gallaher & Aten and Frank Kauke, Attorneys for Plaintiffs:

You and each of you will please take notice that Southern Pacific Company, defendant in the above-entitled action, will on the 4th day of June, 1915, at 10 o'clock A. M., petition the above-entitled court to remove said cause to the District Court of the United States in and for the Northern Division of the Southern District of California, by filing a petition and bond, copies of which are hereto attached and made a part hereof, and reference to which is hereby made for further particulars.

Dated June 3d, 1915.

L. L. CORY,  
Attorney for Petitioner.

[Endorsed]: 18,238. Filed Jun. 4, 1915. D. M. Barnwell, Clerk. By Louis F. Ryan, Deputy. [17]

*In the Superior Court of the County of Fresno, State  
of California.*

No. 18,238.

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Petition for Removal of Cause to United States  
District Court.**

To the Honorable, the Superior Court of the County  
of Fresno, State of California:

Your petitioner, Southern Pacific Company, re-  
spectfully shows:

I.

That it is the defendant in the above-entitled suit  
or action. That said suit, as appears from the com-  
plaint, is of a civil nature at law, brought by plain-  
tiffs to recover judgment against defendant, your  
petitioner, in the sum of thirty-five thousand dollars  
(\$35,000) and costs of suit, which claim your peti-  
tioner wholly contests and denies, and alleges that  
the amount involved in said action, exclusive of in-  
terest and costs, exceeds the value of three thousand  
dollars (\$3,000).

II.

That at the time of the commencement of said suit,



said Southern Pacific Company, your petitioner, was, ever since has been and still is, a railroad corporation, incorporated and existing under the laws of the State of Kentucky, and a citizen and [18] resident of said State, and a nonresident of the State of California. That at the time of the commencement of said suit, plaintiffs and each of them were, ever since have been and now are, citizens of the State of California, and residents of the Southern District of said State.

### III.

That at the time of the commencement of said suit there was, ever since has been and still is therein, a controversy wholly between citizens of different States, which can be fully determined between them—that is to say, between plaintiffs, Gertrude Wright, and Orene Wright, and Ora Wright, by Gertrude Wright, their guardian *ad litem*, and Southern Pacific Company, defendant and petitioner herein.

### IV.

That service of summons was made in said suit on your petitioner on the 5th day of May, 1915, and not before said day, in the city and county of San Francisco, State of California, and your petitioner is not required, by the laws of the State of California or the rules of the above-named Superior Court in which said suit is brought, to answer or plead to the complaint of plaintiffs therein until the 4th day of June, 1915.

### V.

Your petitioner files and offers herewith its bond, with good and sufficient surety, for its entering in

the District Court of the United States, Northern Division of the Southern District of California, within thirty days from the date of filing said petition for removal of said cause, a certified copy of the record in said suit, and for paying all costs that may be awarded by said District Court, if said Court shall hold that said suit was wrongfully or improperly removed thereto.

WHEREFORE, your petitioner prays this Honorable Court to accept said bond as good and sufficient, and to make its order for the removal of said cause to the District Court of the United [19] States for the Northern Division of the Southern District of California, pursuant to the Act of Congress in such cases made and provided, and for such other and further order as may be proper, and to cause the record herein to be removed to said District Court, and that no other or further proceedings be had in said Superior Court.

[Seal] SOUTHERN PACIFIC COMPANY.

By G. L. KING.

L. L. CORY,

Attorney for Petitioner.

State of California,

City and County of San Francisco,—ss.

G. L. King, being duly sworn, deposes and says:

That he is an officer, to wit, assistant secretary, of Southern Pacific Company, petitioner herein; that he has read the foregoing petition and knows the contents thereof, and that said petition is true of his own knowledge, except as to the matters therein stated

on information or belief, and as to such matters that he believes it to be true.

[Seal]

G. L. KING.

Subscribed and sworn to before me this 25th day of May, 1915.

[Seal]

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California. [20]

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*In the Superior Court of the County of Fresno, State of California.*

No. 18,238.

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Bond for Removal.**

KNOW ALL MEN BY THESE PRESENTS:  
That Southern Pacific Company, a corporation duly incorporated and existing under laws of the State of Kentucky, and a resident of said State, as principal, and United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, which said corporation has complied with the laws of the State of California with reference to doing and transacting

business in said State of California, as surety, are held and firmly bound unto Gertrude Wright, and Orene Wright, and Ora Wright, by Gertrude Wright, their guardian *ad litem*, in the penal sum of one thousand dollars (\$1,000), for the payment whereof, well and truly to be made unto said Gertrude Wright, and Orene Wright, and Ora Wright, by Gertrude Wright, their guardian *ad litem*, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and dated in the city and county of San Francisco, State of California, this 25th day of May, 1915.

WHEREAS said Southern Pacific Company has petitioned, [21] or is about to petition, the above-named Superior Court for the removal of the above-entitled cause of action therein pending, wherein said Gertrude Wright, and Orene Wright, and Ora Wright, by Gertrude Wright, their guardian *ad litem*, are plaintiffs, and said Southern Pacific Company is defendant, to the District Court of the United States for the Northern Division of the Southern District of California.

NOW, THE CONDITION of this obligation is such that, if the said defendant, Southern Pacific Company shall enter in said District Court of the United States in and for the Northern Division of the Southern District of California, within thirty days from the date of filing said petition for removal of said cause, a certified copy of the record in the above-entitled suit or action, and shall pay all costs that may be awarded by said District Court if said



District Court shall hold that said suit was wrongfully or improperly removed thereto, and shall appear and enter special bail in said suit if special bail was originally requisite therein, then the above obligation shall be void; otherwise, it shall remain in full force and effect.

WITNESS our hands and seals the day and year first above written.

SOUTHERN PACIFIC COMPANY,

[Seal]

By G. L. KING,

Assistant Secretary.

UNITED STATES FIDELITY AND  
GUARANTY COMPANY.

[Seal]

By W. S. ALEXANDER,

Attorney in Fact.

And PAUL J. LEVERING,

Attorney in Fact.

State of California,

City and County of San Francisco,—ss.

On this 25th day of May, 1915, before me, E. B. Ryan, a notary public in and for the city and county of San Francisco, [22] duly commissioned and sworn, personally appeared G. L. King, known to me as the assistant secretary of the Southern Pacific Company, the corporation described in and that executed the foregoing bond, and acknowledged to me that said corporation executed the said bond.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, State of Cali-

fornia, the day and year in this certificate first above written.

[Seal]

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California.

State of California,

City and County of San Francisco,—ss.

On this 25th day of May, 1915, before me, W. W. Healey, a notary public in and for the city and county of San Francisco, duly commissioned and sworn, personally appeared W. S. Alexander and Paul J. Levering, known to me to be the persons whose names are subscribed to the foregoing instrument as attorneys in fact for the United States Fidelity and Guaranty Company, and they acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as attorney in fact.

[Seal]

W. W. HEALEY,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: 18,238. Filed Jun. 4, 1915. D. M. Barnwell, Clerk. By Louis F. Ryan, Deputy. [23]

*In the Superior Court of the County of Fresno, State  
of California.*

No. 18,238.

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Order for Removal.**

Upon reading and filing the petition and bond of defendant Southern Pacific Company for removal of the above-entitled action to the United States District Court for the Northern Division of the Southern District of California, and it appearing to the Court that written notice of said petition and bond for removal was given by defendant to plaintiffs prior to filing said petition and bond, and this matter duly coming on for hearing, said bond is hereby approved and accepted as good and sufficient, and it is hereby ORDERED that said cause be, and the same is, hereby removed to the District Court of the United States for the Northern Division of the Southern District of California.

Dated this 4th day of June, 1915.

H. Z. AUSTIN,  
Judge.

[Endorsed]: 18,238. Filed Jun. 4, 1915. D. M. Barnwell, Clerk. By Louis F. Ryan, Deputy. [24]

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*In the Superior Court of the County of Fresno,  
State of California.*

No. 18,238.

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *Ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,  
Defendant.

**Certificate of Clerk of State Court on Removal.**

I, D. M. Barnwell, County Clerk and ex-officio clerk of the Superior Court of the county of Fresno, State of California, hereby certify that I have compared the annexed and foregoing copies of complaint, demurrer, notice, petition and bond of defendant Southern Pacific Company, for removal of cause to the United States District Court for the Northern Division of the Southern District of California, and order for removal, in the case of Gertrude Wright, and Orene Wright and Ora Wright, by Gertrude Wright, their guardian *ad litem*, vs. Southern Pacific Company, and constituting the record in said cause, with the originals now on file in my office, and that such annexed and foregoing copies are true and correct transcripts thereof, and of the whole of said originals.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court this 4th day of June, 1915.

[Seal]

D. M. BARNWELL,

Clerk.

(Documentary Stamp. 10¢.) [25]

[Endorsed]: No. 71—Civ. U. S. District Court, Southern District of California, Northern Division. Gertrude Wright et al., Plaintiffs, vs. Southern Pacific Company, Defendant. Transcript on Removal. Filed Jun. 8, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. \_\_\_\_\_, Attorney for \_\_\_\_\_, 828 Flood Building, San Francisco, California. [26]

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*In the District Court of the United States, Southern District of California, Northern Division.*

GERTRUDE WRIGHT, and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *Ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

Defendant.

**Answer.**

Now comes the defendant above named, and answering the Complaint of the plaintiff herein, alleges and denies as follows, to wit:

I.

That it has no information or belief with refer-

ence to any of the allegations contained in paragraph II of said Complaint, sufficient to enable it to answer the same, and basing its denials upon that ground, denies that the plaintiffs are, or either of them is, a minor, or that either of them is under the age of fourteen years, or that the plaintiff Gertrude Wright is the mother of said minors, or either of them, or that at the time of the beginning of this action, or at any other time, said Gertrude Wright made any application to be appointed the guardian *ad litem* of said minors, or either of them, for the purpose of prosecuting or conducting this action, or otherwise, or that any such alleged application was granted by any order of Court duly, or otherwise, given, made or entered, or that said Gertrude Wright has ever been appointed or is now the duly or otherwise qualified or acting guardian *ad litem* of the plaintiffs or either of them.

## II.

This defendant denies that at any time or place, while [27] George R. Wright was traveling upon any highway or attempting to cross any railroad track of this defendant, or at any time while he was passing on to or attempting to cross any railroad track of this defendant, it, through any of its agents or servants or otherwise, then or there acting within the scope of their or either of their employment, in any manner carelessly or negligently operated any locomotive of the defendant on any railroad so that any locomotive of this defendant ran into or upon or collided with any automobile truck in which said George R. Wright was then or there or at any time

riding, in consequence of which, or otherwise, said George R. Wright was then or there, or at any time, thrown violently, or otherwise, from any automobile truck, or that he was then or there, by reason of any fault or negligence whatsoever of this defendant, maimed or killed.

### III.

That this defendant has no information or belief with reference to any of the allegations contained in paragraph V of said Complaint sufficient to enable it to answer the same, and basing its denials upon that ground, denies that the plaintiffs are, or any one of them is, the heir at law, or that the plaintiffs are all of the heirs at law of said George R. Wright; or that the plaintiff Gertrude Wright is thirty-one years of age or is the surviving wife of said George R. Wright; or that the plaintiffs Orene Wright and Ora Wright are the children of said George R. Wright, or that the plaintiffs were, or either of them was, at the time of the death of said George R. Wright, dependent upon him for support and maintenance, or were, or are, entitled to support, maintenance society, comfort or protection at the hands of said George R. Wright, or would now be entitled to receive, or would receive from said George R. Wright, were he living, or otherwise, any support, maintenance, society, comfort or protection, or that [28] all of the plaintiffs have been, or any one of them has been, deprived, by the death of said George R. Wright, of any support, maintenance, society, comfort or protection, or that in his lifetime said George R. Wright was a hardworking, sturdy,

robust man, or was thirty-seven years of age at the time of his death, or that he was earning, or was capable of earning any sum in excess of \$50 per month in any business in which he was then engaged.

#### IV.

This defendant denies that on account of the death of said George R. Wright, caused by any carelessness or negligence whatsoever of this defendant, the plaintiffs have, or any one of them has, suffered damages in any sum whatsoever.

And this defendant, further answering said Complaint, alleges:

#### I.

That the alleged death of said George R. Wright was occasioned solely and alone because of the carelessness and want of care of said deceased and the person driving and in charge of said automobile truck. That neither said George R. Wright or the person driving and managing said automobile truck looked or listened for any approaching train before they attempted to cross the tracks of this defendant as alleged in said Complaint. That at the time said George R. Wright and the person in charge of said automobile truck approached said crossing and attempted to cross the track of the defendant, as alleged in said Complaint, the approaching train of the defendant which collided with the automobile in which said George R. Wright was then traveling, was in plain view and could have been seen in ample time to have avoided the accident resulting in the death of said George R. Wright. That neither said George R. Wright or the person driving [29]



and in charge of said automobile truck looked or listened for an approaching train before attempting to cross the track of the defendant at the time of the accident, and if either of said parties had looked or listened before attempting to cross said track, they and each of them would have seen the approaching locomotive and train of the defendant in ample time to have stopped and prevented the accident.

WHEREFORE, defendant prays that plaintiffs take nothing by their action, and that the defendant have judgment for its costs of suit.

L. L. CORY,

Attorney for Defendant.

State of California,  
County of Fresno,—ss.

L. L. Cory, being first duly sworn, deposes and says: That he is the attorney for the defendant corporation above named; that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and that as to those matters that he believes it to be true; that the reason why this verification is made by affiant, and not by one of the officers or representatives of the defendant, is that the facts are within the personal knowledge of affiant and that no one of the officers or representatives of the defendant resides or has his place of business in the county of Fresno where affiant resides and has his place of business.

L. L. CORY.

Subscribed and sworn to before me this 4th day of December, 1915.

[Seal]

ELEANOR OWEN,

Notary Public in and for the County of Fresno,  
State of California. [30]

[Endorsed]: 71—Civil. In the District Court of the United States, Southern District of California, Northern Division. Gertrude Wright, and Orene and Ora Wright by Gertrude Wright, Their Guardian *ad Litem*, Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Answer. Due service of the within Answer admitted by copy this 7th day of December, 1915. Frank Kauke, Gallaher & Aten, Attorneys for Plaintiffs. Filed Dec. 8, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. L. L. Cory, Attorney at Law, First National Bank Building, Fresno, Cal., Attorney for Defendant. [31]

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*In the District Court of the United States, in and for the Southern District of California, Northern Division.*

No. 71—CIVIL.

GERTRUDE WRIGHT and ORENE WRIGHT,  
by GERTRUDE WRIGHT, Their Guardian  
*ad Litem*,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Verdict.**

We, the jury in the above-entitled cause, find in favor of the plaintiffs, and assess as damages against said defendant the sum of twelve thousand and no/100 dollars (\$12,000).

Dated Fresno, Cal., May 5, 1916.

H. M. McLENNAN,  
Foreman.

[Endorsed]: 71—Civil. U. S. Dist. Court, So. Dist. Cal., No. Div. Gertrude Wright et al. vs. Southern Pacific Co. Verdict. Filed May 5, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [32]

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**UNITED STATES OF AMERICA.**

*District Court of the United States, Southern District of California, Northern Division.*

No. 71—CIVIL.

GERTRUDE WRIGHT and ORENE WRIGHT,  
by GERTRUDE WRIGHT, Their Guardian  
*ad Litem*,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

Defendant.

**Judgment.**

This cause coming on regularly to be tried before the Court and a jury to be duly impaneled, on

Wednesday, the 3d day of May, 1916, being a day in the May term, A. D. 1916, of said District Court of the United States of America, in and for the Southern District of California, Northern Division; M. G. Gallaher, Esq., Ralph Aten, Esq., and Frank Kauke, Esq., appearing as counsel for plaintiffs; L. L. Cory, Esq., appearing as counsel for defendant; and a jury of twelve (12) men having been duly impaneled, and the trial having been proceeded with on said 3d day of May, 1916, and on the following 4th and 5th days of May, 1916, and testimony having been presented on behalf of the plaintiff, and defendant having moved for a nonsuit, which motion is overruled by the Court, and the defendant having thereupon rested without offering any evidence herein; and the cause having been argued to the jury by counsel for the respective parties, and having been submitted to the jury, under the instructions of the Court, and the jury having thereupon, on said 5th day of May, [33] 1916, rendered the following verdict, viz.: "In the District Court of the United States, in and for the Southern District of California, Northern Division. Gertrude Wright and Orene Wright, by Gertrude Wright, their guardian *ad litem*, Plaintiffs, vs. Southern Pacific Company, a corporation, Defendant. No. 71—Civil. Verdict. We, the jury in the above-entitled cause, find in favor of the plaintiffs, and assess as damages against said defendant the sum of twelve thousand and no/100 dollars (\$12,000).

Dated Fresno, Cal., May 5th, 1916.

H. M. McLENNAN,  
Foreman."



—and the Court having ordered that judgment be entered herein in accordance with the verdict of the jury;

NOW, THEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is considered by the Court that Gertrude Wright and Orene Wright, by Gertrude Wright, their guardian *ad litem*, plaintiffs herein, do have and recover of and from the Southern Pacific Company, a corporation, defendant herein, the sum of twelve thousand dollars (\$12,000), together with their, said plaintiff's costs, in that behalf taxed at \$58.50.

Judgment entered May 8, 1916.

WM. M. VAN DYKE,  
Clerk.

By Leslie S. Colyer,  
Deputy Clerk.

[Endorsed]: No. 71—Civil. United States District Court, Southern District of California, Northern Division. Gertrude Wright and Orene Wright, Their Guardian *ad Litem*, Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Copy of Judgment. Filed May 9, 1916. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy. [34]

*In the District Court of the United States, in and  
for the Southern District of California, North-  
ern Division.*

No. 71—CIVIL.

GERTRUDE WRIGHT, and ORENE WRIGHT  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corpora-  
tion,

Defendant.

**Certificate of Clerk to Judgment-roll.**

I, Wm. M. Van Dyke, Clerk of the District Court  
of the United States of America, in and for the  
Southern District of California, do hereby certify  
the foregoing to be a true copy of the Judgment  
entered in the above-entitled action, and recorded  
in Judgment-book No. 1, at page 114 thereof, for  
the Northern Division; and I do further certify that  
the papers hereto annexed constitute the Judgment-  
roll in said action.

ATTEST my hand and the seal of said District  
Court, this 9th day of May, A. D. 1916.

[Seal]

WM. M. VAN DYKE,

Clerk.

By T. F. Green,

Deputy Clerk.

[Endorsed]: No. 71—Civil. In the District Court of the United States for the Southern District of California, Northern Division. Gertrude Wright et al. etc. vs. Southern Pacific Company, a Corp. Judgment-roll. Filed May 9, 1916. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk. Recorded Judgment-book No. 1, page 114.

[35]

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*In the District Court of the United States Southern  
District of California, Northern Division.*

GERTRUDE WRIGHT and ORENE WRIGHT and  
ORA WRIGHT, by GERTRUDE WRIGHT,  
their Guardian *ad Litem*,

Plaintiffs,

v.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

**Bill of Exceptions.**

BE IT REMEMBERED, that on the 3d day of May, 1916, this action came on regularly to be tried before this Court, with a jury, Messrs. Gallaher & Aten and Frank Kauke appearing as attorneys for the plaintiffs, and L. L. Cory, Esq., appearing as attorney for defendant, at which time the following proceedings were had and evidence taken, to wit:

**Testimony of Fred Tucker, for Plaintiffs.**

FRED TUCKER, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. KAUKÉ.)

My name is Fred Tucker. I reside at Selma. I

(Testimony of Fred Tucker.)

have resided there about three years. My age is thirty-seven. I am in the automobile business and was in that business in May, 1914, the same as now, handling and selling automobiles, having a place of business in Selma for that purpose. I have been handling and operating automobiles and automobile trucks for about four years. During that time, as a driver or what is called a chauffeur, I have been familiar with the operating of machines and trucks, [36] automobiles. On May 22d, 1914, I was one of the parties that were in the collision on the Southern Pacific Railroad crossing at Selma. It was a 3½ ton Kelly truck that was being used (T. p. 3). It had been used very little and was obtained from J. C. Phelan. I had full charge of the operating of the truck. Prior to the time of the accident that morning we had hauled one load of raisins to Del Rey and on the return trip had filled up with distillate at the Standard Oil Company's filling station. We had a flat rack, made of 2-inch lumber, on the truck for hauling raisins. Mr. Wright had been riding with me on this truck during that morning up to the time of the accident. I was driving as we were coming down from the Standard Oil Tanks to the place of the accident (T. p. 4).

#### EXCEPTION NO. 1.

Mr. KAUKU.—Q. Did Mr. Wright have anything to do with the operating of the machine?

Mr. CORY.—Objected to as irrelevant, incompetent and immaterial, not tending to prove any issue in the case.



(Testimony of Fred Tucker.)

The COURT.—The objection is overruled.

(Question read.)

A. None whatever.

### EXCEPTION NO. 2.

Mr. KAUKKE.—Q. Did he assume, in other words, did he give you any directions or instructions or say anything to you as to how it should be operated, at all? A. No, sir.

Mr. CORY.—Objected to as irrelevant, incompetent and immaterial, calling for hearsay testimony.

The COURT.—The objection is overruled.

Mr. KAUKKE.—Your answer? A. No, sir.

WITNESS.—(Continuing.) I do not know just what they call this street where this accident occurred; it is a junction of Arrant's street I think. This extension of Arrant Street goes across the Southern Pacific tracks at right angles, squarely across [37] (T. p. 5 and 6). There is a street or roadway westerly of the railroad running northwest and southeast, commonly called West Front Street, and there is a roadway easterly of the railroad track running northwest and southeast called East Front Street. There are two switching tracks or side tracks between East Front Street and the main line of the railroad where the regular trains come in. As near as my measurements or estimates can furnish you, it is about 60 feet from the main line of the railroad to the roadway on East Front Street, measuring at right angles. I know the location of the Standard Oil Company's tanks, or oil business up the

(Testimony of Fred Tucker.)

track towards the northwest, on the east side of the track. I have measured that by stepping or otherwise, so that I know approximately the distance from this crossing on Arrant Street where the accident occurred, to the Standard Oil Company tanks; it is about 1400 feet (T. p. 6). The next crossing north across the Southern Pacific tracks, after Arrant Street, is beyond the oil works, the county road, I suppose. I do not know the name of it. It crosses the track at right angles, or practically so, might be a little at another angle. The road comes down north and south and makes a little turn. In any event, there is a crossing north of the oil tank. It is three city blocks from the crossing where the accident occurred to the passenger depot in Selma. When we were at the oil tanks we filled the car with distillate there. After leaving the oil tanks that morning we came southeast, parallel with the railroad; that would be on East Front Street (T. p. 7). It was immediately prior to the accident, or collision, that we were coming down that street. On that trip down, at about 145 feet, in a circle, where we would start to make the turn across the track, I looked for the trains which might be coming from the northwest and going southeast. In other words, I would have to travel about 145 feet from that point of observation to the crossing of the main line. That point where we were, if instead of going around [38] from that point you measured straight across, would be about 60 ft. from the main line. What I have already stated was the distance from the main

(Testimony of Fred Tucker.)

line, at right angles. At that point, with reference to looking for trains, I looked at the track, as far as I could see in making the angle—would be about the oil station or probably a little further, looking up the track as I made the circle. I would have to make a circle to cross the track. I looked up the track and could see with a clear vision to the oil tanks, or a little further at the point I looked (T. p. 8).

At this point the blue-print hereinafter referred to was presented by Mr. Cory (T. p. 9).

WITNESS.—(Continuing.) I have located the place in the road, as near as it is possible to locate it, where we were when I looked for the train to the northwest. When I looked there I listened for trains. My eyesight is perfect and my hearing is good. At that time I saw the railroad track from the crossing to pass, northwesterly, a point beyond the oil tanks. I did not see any train there, none in sight. I had not, prior to that time, or at that time, heard any warning sound, in the way of a bell, whistle or otherwise, of a train (T. p. 10–11).

Mr. GALLAHER.—If your Honor please, a witness who is here only to identify a book, is in bad health, and the doctor tells him to get back home, and we would like to withdraw this witness just long enough to identify the book.

The COURT.—All right.

**Testimony of O. E. Dillon for Plaintiffs.**

O. E. DILLON, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. GALLAHER.)

My name is O. E. Dillon. I live at Selma. I am city clerk at Selma, and as such have the custody of the books and records of the city. The book you have handed me, marked "Ordinances," is the ordinance record book of the city of Selma, and contains [39] the record of ordinances passed by the board of city trustees. I do not recall the page of the ordinance book the ordinance is on. I didn't look the matter up at all this morning. I just simply saw that the number was probably in there.

EXCEPTION NO. 3.

Mr. GALLAHER.—I have it. We desire to introduce in evidence, so that this book may not be retained here, Section 17 of Ordinance No. 51 of the city of Selma, commonly known and entitled as the misdemeanor ordinance of the city of Selma. We offer Section 17.

Mr. CORY.—We object to that as irrelevant, incompetent and immaterial, if the Court please, not shown to have been adopted in any manner at any meeting of said city trustees, or published as required by law, or duly authenticated in any way.

Mr. GALLAHER.—The statute providing for the keeping of an ordinance book in the State of California provides it shall be *prima facie* evidence as to



(Testimony of O. E. Dillon.)

the existence, force and effect of the ordinance as therein set forth.

The COURT.—The objection is overruled.

Mr. CORY.—We except.

Mr. GALLAHER.—We desire to read into evidence, so that the book may be returned, Section 17, appearing at page 197 of the Book of Ordinances.

Mr. KAUKÉ.—Mr. Cory, do you want the whole ordinance read? Do you desire the whole ordinance read?

Mr. CORY.—No, I don't care anything about it.

Mr. GALLAHER.—(Reading:) "Section 17. Any person who shall run or propel any railroad car, locomotive, hand-car, horse car or any train of cars in this town at a greater rate of speed than eight miles per hour, or in such manner as to endanger or obstruct the free passage of any public street, is guilty of a misdemeanor." [40]

Mr. GALLAHER.—(Continuing.) The certificate is: Passed at a regular session of the board of trustees of the town of Selma held this 26th day of December 1896—giving the vote, and certified by the clerk. That is all.

**Testimony of Fred Tucker, for Plaintiffs (Recalled).**

FRED TUCKER, being recalled for further examination, testified as follows:

Direct Examination.

(By Mr. KAUKÉ.)

After locating that point as near as it is possible to do, I then measured it more or less accurately to

(Testimony of Fred Tucker.)

ascertain how far that point was from the middle of the main track where this accident occurred (T. p. 13). That was about 145 feet. From that point on to where the accident occurred, with reference to looking or listening or observing the railroad track for trains, the first thing I did was to look clear up the track, that it was clear in this direction. I got a good clear vision as far as the oil station or a little further, which satisfied me absolutely that there was no train coming. Then, being that Castle Bros. packing-house on the left hid the view both on the platform and side tracks there, which are always as much allowed for as the main tracks, in case of switching, I directed my view that way until I got clear out beyond until I knew everything was safe the way my view was ahead (T. p. 13-14). I looked to the left, which would be southeasterly, down towards the depot and Castle Bros. packing-house to see whether anything was coming northwesterly. Then after I was through looking that way I turned and looked the other way. When I turned my gaze from the southeasterly and looked back the other way I had reached the point where the truck was practically going on to the main line track, as near as I can remember, when I saw the train coming, the front end of the train; pratically, the front part of the truck was on the main line (T. p. 14). I could only [41] see the train coming and didn't hear any whistle or bell. When I saw the train it appeared to be coming very fast, it seemed to be 200, 300 or 400 ft. away, but it is hard to tell, possibly say

(Testimony of Fred Tucker.)

400 ft. It was coming from the northwest. I then reached down and opened the throttle and tried to gain a little more speed—I was going very slow—and my automobile went forward. I watched this way until the train struck. That is the last I knew. I was rendered unconscious by this collision. I should judge it was the afternoon of the same day when I regained consciousness. So far as I observed the time, the collision was at 9 o'clock in the morning. I didn't see or hear anything as to any brake being applied. I didn't hear the bell or whistle (T. p. 15-16).

#### EXCEPTION NO. 4.

Mr. KAUCHE.—Q. This man, Mr. Wright, that was with you, if you know from knowledge you then had, or since obtained, what was his age, or about what at that time?

Mr. CORY.—I object to that as calling for the opinion of the witness. I suppose there are better ways of proving that, if the Court please.

The COURT.—Objection overruled.

Q. I would judge Mr. Wright to be about 30 years old. I don't know what his age was.

Mr. CORY.—I move that the answer be stricken out, if the Court please.

The COURT.—Overruled.

WITNESS.—(Continuing.) Up to that time I had known Mr. Wright about two years. I should judge he would weigh 185 or 190 lbs. He seemed to be a strong man, perfectly healthy, from my ac-

(Testimony of Fred Tucker.)

quaintance with him (T. p. 17). I believe with reference to observing the train, that Mr. Wright looked up the track at the same time I did, when we first made the circle. After that I didn't observe because I was looking away from him. Nothing was done by him that I saw, or said by him to me, with reference to the train coming down. I can see the blue-print on the board from here.

Mr. KAUKÉ.—Q. Now, this is marked on here "Standard Oil Company" and here is a rectangular space there. Do you know what that represents, Mr. Tucker?

A. That I think, is a structure of some kind alongside of the railroad reservation. In coming down from the Standard Oil Company's [42] tanks there is a road that winds about until it gets down further south; that is the road we came, and then we came on down East Front St. This map here shows Arrant St. running diagonally and then goes at right angles across the track (T. p. 18). That is the street where the accident occurred, and that is the main line there, where you have your finger, or thereabouts, on the map. When I looked up the track to see whether the coast was clear I should judge I was about here (indicating on blue-print), about half an inch northeasterly of the cross on the map, near the turn. This to the west, I mean on the west side, running parallel with the track, is what I referred to heretofore as West Front St., and it is so marked on the map. That crossing which, if this track runs northwesterly, must apparently be run-



(Testimony of Fred Tucker.)

ning north and south, is the crossing I referred to as being the crossing north of the Standard Oil Company, and then beyond that, further northwesterly, is what I referred to as the cemetery. Right here at the southeasterly part of that extension of Arrant St. is a rectangular space marked here "Castle Bros. packing-house." That is the packing-house I referred to (T. p. 19-20), the one where I looked to the southeast to notice the trains coming up from the south that pass that packing-house. The main line being here, this next space is what you call a side-track of some kind, and then east of that is another one, being two tracks east of the main line, and that we had to cross before we got to the main line where the accident occurred.

Cross-examination.

(By Mr. CORY.)

I have lived in Selma about four years. I lived there for about two years before the accident and during that period of time I had been in the automobile business. The day on which the accident occurred was a bright May day so far as I remember and no wind blowing. There was no unusual noise to distract my attention at the time we made this crossing. I had gone with Mr. Wright to the Standard Oil Station for the purpose of filling the truck with distillate, shortly before 9 o'clock that morning, and when we had filled it, we started back to Selma again along this road known as East Front road. The truck was a left-hand drive. As we proceeded down that road towards Selma I was driving the

(Testimony of Fred Tucker.)

truck. I was on the east side of the track [43] in other words, the side of the track furthest away from the railroad. Mr. Wright was seated with me on the right side. There was one seat to the truck and he was with me on it on the side nearest the railroad (T. p. 21). In a way I was fulfilling two things, demonstrating the truck to Mr. Wright and also doing some work for him. He was paying for the use of the truck, renting it. I was driving the truck for Mr. Phelan; I had charge of it, was the driver to go with it, and Mr. Wright was paying the rental for it. It had been in use one day before that. He had rented it for the previous day and that day (T. p. 22). I should judge we were going about 6 miles an hour while we were coming down the highway, and while we were coming down the road, about 6 miles an hour, until I got to the corner. The truck was empty. I was not talking to Mr. Wright and he was not saying a word, not from the time we were at least half way down from the oil station to that point, up to the time of the accident. Nothing was said that I know of. All that time we were going about 6 miles an hour until I came to the turn, then I slowed down to about, I should judge, from three to four miles an hour. There is a circular turn there (T. p. 23). As near as I can figure out, when I started to make the turn I looked first towards the oil tanks to see that there was no train coming. I looked up the track and did not see any train coming and from that time proceeded on my way, and never looked in the same way again to see if there was a

(Testimony of Fred Tucker.)

train approaching until I passed a clear vision of the packing-house. I was practically on the main track and looked and saw the train coming right on us. For the 145 feet that I testified to, during that entire time while we were traversing that 145 feet, practically, I never looked again towards the oil tanks or the northwest to see if the train was approaching. The view was not obstructed in any way (T. p. 24). There were only 8 or 10 poles zigzagging along through there, I don't know just how many there were. The only thing there was [44] to obstruct our vision, if it can be an obstruction, were some telegraph poles. The whole space there was unobstructed and there was no reason why, if I had looked, I couldn't have seen the train approaching. I am sure Mr. Wright's eyesight was good. It was good as far as I know, and his hearing was good. I would have no way of knowing that his eyesight was good and his hearing good, except that I was sure it was. Before we reached the main track at that crossing on that day we crossed two other tracks on the railroad. The main track was the third track (T. p. 25). I measured that distance as near as I could; I stepped it. I have been there several times since the accident. I made the measurements for the purpose of locating the point within the last week. No one requested me to do that. The first time I went there for the purpose of locating that point and making the measurements was some time after I got well, within the same year, possibly. I went alone. To



(Testimony of Fred Tucker.)

determine this point where I think it was that I first looked up the track to see whether a train was approaching, I took a truck and drove it over the ground at as near as I could the same speed and the same way that I drove it that day (T. p. 26). I drove the truck over there for the purpose of making an estimate, as near exactly the same as I could. I have no way exactly of definitely locating that point where I say I looked, but the best of my recollection and the best information I have at the present time, it was about 145 feet. Then I measured the point, stepped it off. I also stepped the distance between the crossing and the oil tanks; as near as I could I stepped it in my own way of stepping, and as accurately as I could. I made the distance to where my vision would reach at that time about 1400 feet, I should judge, the way I stepped it. As I came nearer the center line of the track, the main line where the accident occurred, I could see further and further up the main track, so before I reached the main track there was nothing to obscure my vision for miles up the main track except the poles, that I [45] remember. The nearer I approached the main track the further up the main track I could see (T. p. 27.) From the point where I was, the only obstruction would be the oil tanks, except these poles that I mentioned. When I first saw the train I think the front wheels of the truck were just about on the main track, and then my only thought was to put on speed and see if I could get across in front of it.



(Testimony of Fred Tucker.)

Q. And of course, how far that was from you, bearing down upon you, or how fast it was going, you had no means of knowing?

A. I am pretty sure it was from three to four hundred feet.

WITNESS.—(Continuing.) The only means of knowing is to go over the ground again and look where I saw the train. I had no way of knowing how fast it was coming right towards me. The minute I saw the train I speeded up the machine and it responded quickly. The train struck the rear wheel of the machine. A few inches more and we would have cleared the track (T. p. 28).

Redirect Examination.

(By Mr. KAUCHE.)

Going over the route with the truck since the accident was for the purpose of locating the point and the rate of speed. I know where I saw the train; I could take the truck and go over it again and see, and then I have stepped the ground, to locate how far I could see by turning there. Referring to this map, I think I could see possibly halfway between what is marked here the "Standard tank" and the road. The rate of speed I think we were going from the turn there or from the time I looked to the time I got to the main track was some 3 or 4 miles an hour. I have ascertained that by going over it as near as I could in the same way since then and timing it. In regard to the arrangements made with reference to the use of this truck, I did the talking over the phone (T. p. 29-30). [46]

(Testimony of Fred Tucker.)

EXCEPTION NO. 5.

Mr. KAUKÉ.—Q. Now, what was said and done between you and the owner of the truck and the man that let it be used as to what you were to do with reference to it?

Mr. CORY.—We object to that as irrelevant, incompetent and immaterial and calling for hearsay.

The COURT.—Overruled.

A. The conversation over the phone?

Q. Yes.

A. Mr. Phelan said he would rent Mr. Wright the truck for \$15 a day providing I would drive it, but he would not rent it to him, let him drive it, because he didn't know him, and didn't know whether he knew how to drive it or not, and he knew that I knew how to drive it. He said that. I was working for him. I had worked for Mr. Phelan before then. Mr. Phelan only said it was all right over the phone providing I would drive it (T. p. 30). I had no arrangement with Mr. Wright about employing me. He was to get the truck for \$15 a day. With reference to the oil tanks or road and the city limits, I could show you on the map; about here, some place right in close here (indicating on blueprint), north of the tanks and south of the crossing are the city limits (T. p. 31-32).

Recross-examination.

(By Mr. CORY.)

I called the truck a 3½ ton truck. I mean the carrying capacity; I don't know the weight of the truck. The maximum speed of the truck, when

(Testimony of Oscar Thurman Hess.)  
empty, is 12 miles an hour. It would not make 12 miles an hour loaded (T. p. 32). [47]

**Testimony of Oscar Thurman Hess, for Plaintiffs.**

OSCAR THURMAN HESS, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. KAUCHE.)

I reside at 2325 West Front Street, in Selma, California. I am a letter-carrier at Selma (T. p. 32). My age is 27. I am familiar with the various streets and places in the city of Selma on the west side. I was performing my duties as letter-carrier on the morning of the 22d day of May, 1914. I saw the accident in which George R. Wright was killed that morning. At the time of the accident I was almost due south of where it occurred, a little bit to the west. Referring to this map, coming from Fresno and going southeasterly, here is West Front Street, and coming from the oil tanks down this way is East Front Street, and we come to a street that runs diagonally,—Arrant Street, and this is an extension of Arrant Street coming at right angles across the railroad. I was on the sidewalk on West Front Street,—south, towards the main part of town. At that time my judgment was that I was about 200 feet from the main track where this collision occurred. Since, I find it was about 25 feet more, about 75 yards. I was that far away from the collision at the time it occurred. The accident was between 8:45 and 8:50 that morning. I saw the

(Testimony of Oscar Thurman Hess.)

train coming from the northwest to the southeast that morning (T. p. 34), I cannot state the exact place where the train was when I first caught sight of it, but of course it was north of this crossing I noticed the train. When I took particular notice it was between the oil tanks and the crossing, pretty well towards the oil tanks. My hearing and my sight are good. I can say that after I noticed the train there was no whistle, but as far as the bell ringing is concerned, I can't swear positively. I can't say that I heard any bell. I did not hear any bell when the train stopped, or whistle after the train stopped. I can't say whether the bell was ringing after the accident because I was too much interested in taking [48] care of the fellows that were hurt (T. p. 35). I went over there as quick as possible and I did what I could. Before I had time to go there after the engine got across this crossing I did not hear any whistle or ringing of a bell. Before the collision that morning I only noticed the truck coming down the road on the east side of the track. I never noticed any blowing of the whistle during all that time, in that distance or anywhere. I saw the truck do nothing unusual, just coming down that road to make that crossing; I found afterwards that it was to make the crossing, but before it turned in to make the crossing there was nothing more than any other truck would do in coming down that road, just coming ordinarily along. I saw the truck when it made the turn in the road to get to the railroad, coming directly across the track. I don't know ex-



(Testimony of Oscar Thurman Hess.)

actly where the engine was then, but at that time I was paying attention to both, because when that truck made the turn there they were getting close enough to be within danger if one or the other of them didn't stop (T. p. 36). I think the engine was below the oil tanks, that is, between the oil tanks and the crossing.

#### EXCEPTION NO. 6.

Mr. KAUKKE.—Q. What rate of speed, as near as you could estimate from your observation of the speed of the trains and automobiles was the train going when you first saw it?

Mr. CORY.—Objected to as irrelevant, incompetent and immaterial and the witness not shown to be competent.

The COURT.—Overruled.

The WITNESS.—Shall I answer?

The COURT.—Yes.

A. 30 miles.

WITNESS.—(Continuing.) I noticed that the train was not making much noise, that the steam, as I understand it, was cut off, and it was not puffing like it does when it is pulling. You see there is considerable difference between the noise of an engine [49] when it is pulling and when it is not pulling, and I could state when I first noticed it the steam was shut off and the train was not making a great deal of noise. I said it was going at the rate of 30 miles an hour. I never noticed anything in particular with reference to the speed decreasing from then on to the collision; it would decrease some, but

(Testimony of Oscar Thurman Hess.)

at what rate I don't know (T. p. 37). I don't know whether it is down grade from the north to the south. I would say this truck was 100 feet from the main track, as near as I can estimate the distance, at the time I saw the engine somewhere this side of the oil tanks. The wind was blowing some that morning; I don't remember that it was any unusually strong wind. After I got to the place of the accident I saw that Mr. Wright was killed instantly and that Mr. Tucker was quite badly injured, but how bad I can't say, but they were both lying close to the track, on the ground. Mr. Wright was about 20 feet from where it struck the truck, southeast, and Mr. Tucker was something like 50 feet, I don't know the exact measurements, but he was at least twice as far as Mr. Wright was. The truck was thrown a little bit more than half way around. There is the main line there and then there is a side track over there and it was thrown across that side track and facing—it was coming this way when it was struck and after the accident it was setting facing this way and a little bit that way, about in that direction, going across this side track (T. p. 38). The engine struck the hind wheel, I don't know whether in the center or within the circle of the hind wheel, and that wheel was badly broken up, and as far as other damage, the seat was thrown off and also the gasoline can, which lay near Mr. Tucker's head. I didn't notice the pilot or cowcatcher on the engine because it was down beyond the accident and I didn't go down there. The best I remember there were seven

(Testimony of Oscar Thurman Hess.)

coaches on that train. The train came to a standstill where the last coach stayed on the crossing and blocked it. I do not [50] know the length of the coaches. The engine was about five or six hundred feet from the crossing. I did not hear anything in the way of any grinding noise, of brakes, or anything different than the ordinary movement of the wheels, until the collision. At the time I saw the train, and also the truck some hundred feet distant from the main track, I could hear the roaring or rumbling of the train, the wheels or whatever might make a noise. I also heard the truck. I have no knowledge of hearing any bell or whistle. The slacking of the speed of the train was nothing more than it would be with the steam all shut off and just "lagging" in, just natural gravitation, without the engine pulling. I noticed no sudden slacking of speed. I was watching it (T. p. 39-40).

Cross-examination.

(By Mr. CORY.)

About that time I saw there was probably going to be an accident and was very much interested. I don't know as I was excited but I was watching it very closely. I never saw an accident of that kind before, or since. I was not excited, that is something I very seldom get. I was very much interested, but as far as being excited, a man may get excited so that he don't understand what is going on, and that is what I would have you understand, that I was not excited to that extent. I was watching the movements of both very closely, one as much

(Testimony of Oscar Thurman Hess.)

as the other, the best I could. I knew Mr. Tucker and Mr. Wright at that time. As the truck was approaching the crossing they were facing me as they started to turn. I did not recognize them there. I knew the truck; I couldn't see the men well enough to tell just who. I knew Mr. Tucker was demonstrating that truck in Selma and I didn't know who was with him until I got over there. I watched the men in the truck. The only movement I could say positively that the men made was to raise just as the accident happened, both of them. While they were going that hundred feet I think the distance was [51] a little bit too far for me to say they were trying to stop or go ahead, or to look either way. I can't say I saw them make any movement at all until just before they got on the track, just before they were struck (T. p. 42). I was watching generally the movements, what was going on, just as much as I could. The first movement made, that I saw, on the part of either of the men, was just as it struck. They both raised up, both stood up, that way until it was done. I heard no whistle; I can't positively say the bell was not ringing; I do not remember. I don't remember being asked, before the inquest was held down there, whether the bell was ringing; I was asked at that time. I don't remember how long afterwards the inquest was held. The train was coming down on the right-hand side of these men, and Mr. Wright would be nearer the train (T. p. 43). I can't say which side of the truck they went out of, it was so quick I don't know, and



(Testimony of Oscar Thurman Hess.)

after it struck I couldn't tell which way they went, it was done instantly and I couldn't see. When they were a hundred feet or more from the crossing I saw the train south of the oil tanks. There was nothing at that time to obstruct the view of either Mr. Wright or Mr. Tucker of the approaching train between where the truck was and the train. I think the train must have been at least 300 yards, when I first saw it, as the truck began to turn in to the crossing. I testified at the coroner's jury. Since that time I have went over the ground; at that time I had not, therefore my testimony at that time would not be as correct as it should be now. I do not remember that I testified to 150 yards at the time of the inquest. When I first saw the train it was farther away than when I realized there was to be an accident. When I first realized there was going to be an accident the train was I would say a couple of hundred yards away, 600 feet, and the truck was then about one hundred feet away, so the truck went a hundred feet and the train went two hundred yards (T. p. 45). [52] I knew from the fact that the main track is not far from the side track, and there are two spurs on that side of the main line and a hundred feet is not a great ways from the first one, and they were still coming on, and as I couldn't notice any slackening of their speed, thinks I, "My goodness, are they going to come on?" I expected them to stop at any time. At this time the train was in plain view, and it had been in plain view ever since it had passed the oil tanks up there, if they

(Testimony of Oscar Thurman Hess.)

had wanted to look; the view is plain to the oil tank. They were on the road when I first saw them. I saw them before I saw the train. I saw them turn. It was after they had started to make the turn that I thought there was going to be an accident. I estimate the train was going about 30 miles an hour. That estimate is, to the best of my judgment, as to speeds. I have been over the ground since this happened (T. p. 46). I can say, from seeing trains run and paying attention to the speed of machines running, and for that reason, to the best of my knowledge that is as near as I can say as to the speed of that train. I have run a machine; I do not own one. I never ran a train. I have looked at speedometers to ascertain the speed which I was making. I never tried to race a train. I have tried to estimate the speed of trains, that is, since this time I have, and have taken a considerable interest in it. I was satisfied all this time I would be called on this and I wanted to get as near as possible so that I could say definitely about some things. I don't pretend to say positively that it was going 30 miles an hour, because I didn't time the train that morning. I did not know the speed of the truck either, any more so than I knew the speed of the train (47). In my opinion the truck was going 5 or 6 miles an hour. That is slow. The best I can learn, they run up to 15 miles; 15 miles is fast for a truck of that size. There is no grade to speak of there, it is practically on a level. The tracks are practically on the level from the oil tanks; and [53] the grade crossing

(Testimony of Oscar Thurman Hess.)

is level with the track, and the tracks level with the road. It was a nice pleasant May morning. I heard the train coming from the time I first saw it. I was familiar with the time that train reaches Selma. I do not know how long that train has been running on that time (T. p. 48). My business calls me in that neighborhood every morning about the time that train comes along, and if I was on schedule time I generally passed along there some place in that block when the train passed along there for, I will say, along six months. The train was on time practically that morning. It came in just as it usually came in.

On redirect examination, this witness testified as follows:

It usually comes in at the rate of speed I have testified to (T. p. 49). When I first thought there might be danger of a collision, the truck had almost completed the turn but was not facing directly across the track at that time. The turn does not turn square, it swings a little bit; it was on that turn that I noticed it (T. p. 50-51). The truck had not started to make the turn to the right when I noticed it. I saw it before it started to make the turn. I don't think I noticed the train before the truck started to make the turn to the right. That turn to the right is about 125 or 130 feet from where the collision occurred. I could show you on the map about that turn. When I first noticed the train and the truck, the train would be here some place, and the truck along here, just starting to make that turn.

(Testimony of Oscar Thurman Hess.)

There is where I said it was 125 or 130 feet from this place here, and that would be making a long sweeping turn in there. From where it started to make the turn it would have 125 feet to travel before it reached the center of the track (T. p. 51-52).

Recross-examination.

(By Mr. KAUKÉ.)

They would not have to cross the track at that crossing to get into Selma, they could make a swerve to the left, and could still stay on the east of the track and go into Selma that way. [54] There is a road along that way. They would have to go round 'Castle Bros.' packing-house. The Selma Fruit Company packing-house is on the west, crossing here, about four blocks on the west side of town, on the street that crosses by the depot (T. p. 52). There are several ways they might have taken in order to get to Selma.

**Testimony of John Bridges, for Plaintiff.**

JOHN BRIDGES, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. KAUKÉ.)

I reside on Whitson Street in the north end of the city of Selma, a little south of the Standard oil tanks; it is on the west side of the railroad, just about a block from the railroad, on the street across the highway (T. p. 53). I am 35. I was at my home at the time the accident occurred on May 22d, 1914, down there in Selma. I was on the scaffold, paint-



(Tesimony of John Bridges.)

ing the window casing of my own home, if I remember. I had a full view of the railroad, both up and down. I know of this accident occurring on that morning. It was about nine o'clock. I was almost half way between where the accident happened and the oil station, on the west side. I saw this train that had the collision that morning when it came in (T. p. 54). When I first saw it, it was up at the oil station, just above the oil station, right close to the city limits crossing. I saw it from then on down to the place of the accident. I didn't notice the bell ringing. I didn't hear it ringing. The whistle blew at the city limits, at the crossing, right there by the graveyard, that is, the road that runs north and south across the railroad. The whistle was blown for that crossing I should judge something like a hundred yards north of that road, as near as I can fix it, a hundred yards before they got to the crossing. I didn't hear the whistle blow any more. I would judge that about 30 miles an hour was the speed of the train [55] that morning after it got into the city limits, after it came along where I was and further (T. p. 55). What drew my attention was the truck; it was on the opposite side of the track and it was going the same way that the train was and of course when it got down to the crossing to come across there was not any alarm given by the train at all, the train never whistled or anything until it hit the truck. When it hit the truck that gave quite a bit of racket. The truck was just thrown, turned about three circles, it looked like

(Tesimony of John Bridges.)

to me, before it hit the ground. I went down there. The last car was just a little below the crossing when it stopped. I never noticed how many coaches were on the train. I never saw the parties at all. I waited and went down afterwards. After the train had stopped and was standing there I did not notice anything in regard to any signals or sounds from the engine, by the way of a bell or whistle (T. p. 56). I heard no bell, whistle or alarm after it left the first crossing. I saw the train all the time from that signal. Washington Avenue is the one running north and south by the graveyard. The crossing that it whistled at is the one there by the graveyard. The train was on the Fowler side of the graveyard when it gave that whistle (T. p. 57).

Cross-examination.

(By Mr. CORY.)

It seems to me as though that train had been coming along through Selma at about that time of day, that speed, coming through that way, a year or more. I had been living there about 7 years before the accident.

Q. You saw this train come through frequently, did you not, about that time of day?

A. Well, I would not say positively. I know that I seen them coming through there quite a good many times, running pretty good speed.

Q. Well, what was there to call your attention to the fact that you didn't hear any whistle or bell? What impressed it upon you, if anything?

A. Well, I was looking right at the cars and motor

(Tesimony of John Bridges.)

[56] truck both, and if there was any whistle or alarm, I didn't hear it at all.

Q. You don't remember hearing the bell on the day preceding the accident, do you, or any other time, or the whistle, either?

A. I didn't hear an alarm of any kind.

The COURT.—He asked if you heard the bell ring at any other times, on this train?

A. At times it had.

Q. At other times you heard it ring.

A. Yes, other times.

Mr. CORY.—Q. Do you remember any time now when you remember that it did ring?

A. But that one time I didn't. But once in a while before the bell would ring. I was not out there paying attention to whether the whistle blows or the bell rings on that train when it goes by, I am not there every morning. It hardly ever goes through but what I pay attention to it when I am at home, whenever I am outdoors; I do if I am there in the yard. I didn't hear the whistle that morning or the bell either (T. p. 59). The train was coming along about 30 miles an hour, something like that. Sometimes before and afterwards it came through slower than that. Some mornings it comes through a deal faster. When the train is on time it is generally running something like that, about 30 miles an hour. I didn't hear the bell ring or the whistle. I am pretty sure that it didn't ring on that occasion. Of course, I don't know how about that, I didn't hear it ring or hear it whistle, either. I did not

(Testimony of John Bridges.)

shortly after this accident talk it over with anybody, and nobody asked me if I heard the bell ring, shortly afterwards. There was one party, I believe there was, that I was talking with. As to whether the bell rang or not was not called to my attention immediately after the accident. I first considered the question of whether it did ring or not about half an hour or three-quarters after.—That is when the party asked me. I testified at the Coroner's inquest. They asked me there about the bell ringing. The Coroner's inquest was held the next day at Selma, on the 23d of May (T. p. 61). I was asked at that time both as to the whistle and bell (T. p. 62). [57]

**Testimony of Florence Boles, for Plaintiffs.**

FLORENCE BOLES, being first duly sworn, testified as follows:

**Direct Examination.**

(By Mr. KAUCHE.)

My name is Mrs. Florence Boles. I live at 2343 Whitson Street, Selma, California. I was living in Selma on May 22d, 1914. I know the place where the collision occurred in which George R. Wright was killed. I was about two blocks from the place of the accident, west of it. I live on the west side of the track. When I heard the crash I didn't know it was an accident particularly, but I heard the crash and looked out. I could see the place from where I was. I saw nothing but dust. My daughter was with me and she said, "Something has happened." I couldn't say whether it was a great im-



(Testimony of Florence Boles.)

pact or shook the earth so far as our locality was concerned. Prior to that time I had been indoors. I had noticed the train coming in. I didn't notice any bells, or whistling; I just heard the rumbling of the train (T. p. 63). I did not notice any ringing of bells or blowing of whistles after the crash. I went over to the scene of the accident afterwards. I saw the automobile and train. I might have counted how many coaches there were at that time, but I couldn't say at this time how many there were.

Cross-examination.

(By Mr. CORY.)

There is just one block between our street and the railroad. I presume I heard the rumbling of the train long before it passed my house. It proceeded on and presently I heard the crash. The only thing that called my attention to the train that morning at all was that I expected to do some work that day that I was getting at rather late. I just remarked that the train was in, that it was coming (T. p. 64). I had not paid any attention to the clock. I knew about what time the train was due. [58] It was running on that schedule for some little time. The train passing was what called my attention to the time of day (T. p. 65).

**Testimony of Wade Cargile, for Plaintiffs.**

WADE CARGILE, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. KAUCHE.)

My full name is Joe Wade Cargile. I live at

(Testimony of Wade Cargile.)

Selma. This last time I have lived there a little better than three years. I am thirty-seven years old. My sight and hearing are fairly good; I wear glasses. I was in Selma on May 22d, 1914. After there was a collision there on the crossing—extension of Arrant Street and Southern Pacific track—I went to the scene of the accident (T. p. 65). I did not hear the crash. I was unloading poles down near the depot, two blocks from where the train struck the machine. I was in the draying business, working for the deceased, in his employ. I had a team of horses there with me. The siding is probably 10 ft. from the main track, possibly a little more, where I was working. I was on the opposite side of the main track. The first I knew of it some one said there was an accident up there; they heard the train coming or looked up that way. There was quite a few of us there. I don't remember just exactly what it was; some one called my attention to it first. Prior to that I had heard no warning sounds of the train, either whistle or bell. When I got to the place of the accident the engine, it seems to me, must have been a third of the way across the block, anyway; I don't remember just about that. I didn't notice how many coaches there were or where the rear coach was. The first thing I saw was the planks off the truck on the engine and the next thing, I believe, was Mr. Wright's body. As far as I knew he was dead (T. p. 67). I don't think I saw Mr. Tucker. Of course I was concerned when I saw it was Mr. [59] Wright. I did not pay much attention to anything

(Testimony of Wade Cargile.)

else. I met Mr. Wright when he first came from the East to Selma—I have been here 13 years and I don't think I had been here very long when he came—probably 10 or 12 years, something like that. I knew something of his age; he was about two years older than I; that would have made him about 37. I had been in his employ, I believe, a little over a year. He was in the transfer, draying business. I think he had been conducting that for himself and with his father since he had been in Selma. As far as I knew he had been in the business all that time. After his death I did not purchase or take over or conduct the business at once. I believe we bought it about the 1st of December following. I had charge of it, conducting it for the widow, from May to December, and then I purchased it and I now have the business.

#### EXCEPTION NO. 7.

Mr. KAUKER.—Q. Now, do you, from your knowledge of his affairs and the business that he transacted and the business that you transacted after his death and since up to December since then, know approximately what his net earnings would be or were from that business per month, after paying the running expenses of the business?

Mr. CORY.—One minute. I object to that irrelevant, incompetent and immaterial and not a proper estimate on which to base damages, calling for the opinion of the witness and not seeking to elicit any fact.

The COURT.—He asks if he knows. You can an-

(Testimony of Wade Cargile.)

swer that question yes or no.

A. Well, I can get pretty close to it.

Mr. KAUKKE.—Q. And what were his net earnings per month on an average, approximately?

Mr. CORY.—We make the same objection, if the Court please.

The COURT.—Objection overruled.

A. Well, something near, his net earnings were something near [60] \$150 a month, I think (T. p. 68).

WITNESS—(Continuing.) The business varied at different seasons of the year. Of course we have more business in the summer and fall, during the fruit season, than we do at other times. I knew his family prior to his death. I had been at his house every day for about three months, I believe, after I commenced to work for him. He was very strong, very robust, a good man physically, and very industrious. He did not drink at all to excess at any time that I know of. If he did it couldn't be told on him, I never knew it. As far as I know he was kind to his family and his domestic relations were happy and agreeable as much so as could be. I knew the two children, the girl and boy (T. p. 69).

Cross-examination.

(By Mr. CORY.)

I have talked this over with some people as to what I thought Mr. Wright's business was worth, not to any great extent. They just asked me.

Mr. CORY.—Q. Are you making \$150 a month



(Tesimony of Wade Cargile.)

now? A. Why, I expect in the run of the year, take the 12 months, we will probably exceed that. Mr. Wright had been in the dray business ever since he came to California, has been connected with his father as owner. Mr. Wright left some property in Selma; I don't recall just what it was appraised at. He had a very nice piece of property there; he valued it I think at something like \$4000, or maybe more, I don't know just what. He had a machine (T. p. 70). It was a Ford. We gave him \$1500 for the business, Mr. Steele and I. Mrs. Wright has no further interest in the business. Mr. Wright was alone in the business (T. p. 71). [61]

**Testimony of Mrs. Gertrude Wright, in Her Own  
Behalf.**

MRS. GERTRUDE WRIGHT, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. KAUCHE.)

My age is 32. I now reside in Fresno. On May 22d, 1914, I was residing at 2723 Locan Street, Selma (T. p. 71). At that time I was the wife of George R. Wright. His age at that time was 37. We were married in 1901. When he was killed we had been married 13 years. Two children were born to that marriage and both are now living. The one named in the Complaint, Orena, is a girl; she was 12 years old; and Ora Wright, the boy, was 10. At the time the complaint was filed they were practically a year older. My husband and I lived together contin-

(*Tesimony of Mrs. Gertrude Wright.*)

uously from the time we were married to the 22d day of May, 1914. We were married at Clinton, Missouri. We had been at Selma nine years when Mr. Wright was killed. My husband was engaged in the truck and transfer business at the time of his death (T. p. 72). He had been engaged in that business in Selma, for himself, for five years. Before that time he only worked for his father. At the time of his death he had bought and was paying for that business on installments. We owned the home there but it was in the building and loan. I was carrying on a millinery business myself. At the time of his death I had no other source of income than my earnings and his and the income from that business. I helped my husband with his books in his draying business. From my knowledge, as his wife, of the income and the collections, from the books, I made some of the collections and sent out the bills.

#### EXCEPTION NO. 8.

Mr. KAUKÉ.—Q. Do you know after he had paid the running expenses, teams, feed, different expenses there might be of the wagons, the net income from the business there?

Mr. CORY.—One minute, I object to it as irrelevant, incompetent and immaterial and not a proper basis for damages, speculative [62] and calling for the opinion of the witness (T. p. 74-75).

The COURT.—Objection overruled.

Mr. KAUKÉ.—You may answer.

A. \$175 a month.

Mr. KAUKÉ.—\$175 per month?

(Tesimony of Mrs. Gertrude Wright.)

A. Yes, \$150 to \$175.

WITNESS (Continuing.) It would average \$175, some months larger than others. At time in the fall it has been \$200 or \$225. Mr. Wright's eyesight and hearing were good. His weight I should judge was about 184 pounds. He was very robust, not at all sickly. He was always working.

#### EXCEPTION NO. 9.

Mr. KAUCHE.—Q. Always at work. Now, what were his habits as to coming home and being in the society of his wife and children?

Mr. CORY.—Objected to as immaterial for any purpose, if the Court please, not the basis of damage.

The COURT.—There is no allegation in his complaint as to the relations between him and his wife.

Mr. KAUCHE.—Well, the purpose of the question is, that, while we can recover only the pecuniary damages, the pecuniary damages are based upon loss of society and care and comforts, not anything, of course, for the sorrow, or injured feelings, and under the general allegation, the prayer for damages, we are quite sure we are entitled to prove the loss of society (T. p. 75–76). In other words if he was not kind and attentive to his family, it would be one thing that could be shown to the contrary, as to how much they have lost by this killing.

The COURT.—It has been customary, as far as my information goes, to allege in the complaint that the relations of husband and wife have been agreeable and pleasant—devoted or attentive to his wife and children, and all that sort of thing.

(Tesimony of Mrs. Gertrude Wright.)

Mr. CORY.—I understand there must be an issue of that kind in order to entitle them to prove it.

Mr. KAUKÉ.—While I have not the authority here to read to the Court [63] I am quite sure that is not the rule of pleading in this State.

The COURT.—Objection is overruled.

(Question read.) A. He was always there, only when his business called him away. (Witness continuing.) His home life was happy with myself and the children; nothing in the way of discord that I recall or know of. We had our living and we paid \$50 a month on the business and \$333 and something on the house (T. p. 76). So far as I know, there was none of his money devoted to any other source than the paying for the business and the home and the support of his family.

Cross-examination.

(By Mr. CORY.)

He did not own the business, he was paying for a portion. He owed over \$500 on the business when he was killed. Mr. Wright originally paid \$1500 for the business, or agreed to pay \$1500, and of that had paid all but \$500 at the time of his death. That was the only business that he had. He was paying \$50 monthly on the business. He had owned it over four years. Four years before his death he agreed to pay \$1500 for it (T. p. 76-78). During that four years he had paid a thousand dollars on it and at the end of the four years still owed a little over \$500.

There was then introduced by counsel for the plaintiffs the American table of mortality, concern-



ing the expectancy of life of the deceased and each of the plaintiffs, from which it appears that the expectancy of life of Mr. Wright was 30.35 years; that the expectancy of life of Mrs. Wright was 35.33 years; and that the expectancy of life of the two children was respectively 47.45 years and 48.72 years.

[64]

It was thereupon admitted that the appointment of Gertrude Wright as guardian *ad litem* was made as alleged in the Complaint, whereupon plaintiff rested.

The defendant thereupon made a motion for nonsuit, upon the grounds that the evidence of the plaintiff showed beyond any substantial or other conflict that the accident complained of was caused solely and alone by the contributory negligence and want of care of the deceased; that it disclosed that the driver of the machine and the deceased had a clear and unobstructed view of the track upon which the train was approaching when they were a distance of 145 feet from the track on which the accident occurred, and if, during any portion of that distance, either the deceased or the driver had looked in the direction from which the train was approaching, they could have seen it and thus avoided the accident.

After argument, the motion was submitted to the Court for decision and was by the Court overruled, to which ruling the defendant then and there excepted.

#### EXCEPTION NO. 10.

The defendant declined to introduce any testimony

in its behalf and the case was thereupon submitted by it and both sides rested.

By consent, the map herein referred to, was introduced in evidence and marked Plaintiff's Exhibit "A."

The foregoing is the substance of all the testimony taken at the trial of the case.

### **Instructions to the Jury.**

The Court thereupon gave the following instructions to the jury: [65]

The COURT.—“Gentlemen of the jury, every case should be tried according to law and the evidence that is admitted in the case. This is an action of negligence and negligence is defined by the law. You should not be influenced by reason of passion, prejudice or sympathy. It is your duty to judge this case without any such considerations; you should not be prejudiced against the defendant by reason of it being a corporation, and it should have just as fair a trial as if it were a private individual.

Negligence is the omission to do something which a reasonably prudent man, guided by those considerations which usually regulate the conduct of human affairs would do, or is the doing of something which a prudent and reasonable man would not do. It is not intrinsic or absolute but is always relative to some circumstance of time, place or person.

Negligence is of no consequence unless it was the proximate cause of the injury.

The proximate cause of an injury is that cause which in natural and continuous sequence produces the injury, and without which the result would not

have occurred. It is the efficient cause, the one that necessarily sets the other causes in operation.

This definition of negligence as it relates to the cause of an accident, applies alike to the defendant and to the conduct of the deceased.

When we speak of contributory negligence of the deceased, we mean the kind of negligence above defined.

The plaintiffs have the burden of proving that the defendant was guilty of negligence. The burden is sustained when you are satisfied that the greater weight of the evidence is with the plaintiffs. When you come to consider the question of contributory negligence of the deceased, the burden of [66] proof is upon the defendant to show that the deceased was guilty of contributory negligence, and you must be satisfied that the weight of evidence shows that the deceased was guilty of contributory negligence before you can decide that he was.

The question whether or not there was negligence in a particular case should be determined from the circumstances and conditions, as shown in evidence, at the time, surrounding the person against whom the negligence is charged.

The negligence of a servant acting within the scope of his employment is the negligence of the master.

You are further instructed that it is the duty of a railroad company, where its tracks cross the streets of a city, to take reasonable precautions to protect against injury from the movement of its engines and cars, travelers upon the same highway.

Section 486 of the Civil Code of this State provides as follows: 'A bell, of at least twenty pounds

weight, must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed such street, road, or highway; or, a steam whistle must be attached and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same.

The corporation is liable for all damages sustained by any person, and caused by its locomotives, trains, or cars, when the provisions of this section are not complied with.

You are therefore instructed that, should you find from the evidence in this case that on approaching the crossing in question at the time of the accident, there was at no time any bell rung or whistle sounded, or other warning signal given by the defendant, then such failure on the part of the defendant constituted presumptive negligence. [67]

An ordinance of the city of Selma, fixing the maximum rate of speed at which railroad trains may be operated within the corporate limits of the city, has been introduced in evidence, and, upon the question of the alleged negligence of the defendant, you are instructed that if you find that the defendant failed to comply with such municipal ordinance at the time in question, then such failure on its part constituted presumptive negligence.

Before the plaintiff can recover, it must appear from the evidence that the accident resulting in the death of George R. Wright was caused by the negligence of the defendant, unmixed with any negligence



of the deceased, for if negligence on the part of the deceased contributed in any manner, directly or approximately, to his death, there can be no recovery.

You are instructed that the law is well settled that the railroad track of a steam railway must of itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains, and that, if he sees an approaching train upon the track, or could have seen the same if he had looked, he must not place himself in a dangerous position by attempting to cross in front of it, and if when the approaching train is in plain view he attempts to cross in front thereof, and an accident happens by which he is injured, he is guilty of contributory negligence.

You are further instructed that there is no evidence before this jury that either the fireman or engineer had any actual knowledge or notice that either Mr. Tucker or Mr. Wright were crossing or attempting to cross the railroad track in front of the approaching train, and this jury can draw no inference of negligence on the part of the defendant because of the fact that the fireman or engineer might have known of the danger in which Mr. Tucker and Mr. Wright were placed. In other words, the last [68] chance doctrine, so-called, has no application to the facts of this case, and you are to determine this case solely under the instructions given you by the Court.

You are further instructed that the engineer and fireman had a right to assume that the driver of the truck was in possession of his faculties and would

remain in a place of safety and not recklessly expose himself or Mr. Wright to danger.

It is alleged in defendant's answer in this case that the alleged death of said George R. Wright was occasioned solely and alone because of the carelessness and want of care of said deceased and the person driving and in charge of the said automobile truck.

If you find that the automobile truck was operated and driven solely by the witness Tucker, and that the deceased had no control over the operation of the truck, or no right to exercise control over same, and that he did not exercise any supervision or control over the same, then you are further instructed that in such case the negligence of Tucker (if he was negligent) is not to be imputed to the deceased so as to constitute contributory negligence on his part; but that to sustain the defense of contributory negligence, the defendant must prove or the evidence must show personal failure, on the part of the deceased to exercise ordinary care.

In other words, if you find that the deceased, Wright, was riding in the automobile truck, driven by the witness Tucker, and that he, Wright, had neither control of nor the right to control, such driver, and that he was not exercising or assuming control over the truck or such driver at the time of the accident, then, to sustain the defense of contributory negligence on the part of the deceased, it must appear from the evidence that he, personally, as distinguished from the driver of the truck, failed to exercise ordinary care at and immediately prior to the time of the accident which caused his death.

But deceased was required to exercise ordinary care in approaching said crossing. [69]

If you believe from the evidence that the defendant was negligent as alleged in the complaint, and that the death of the deceased was thereby approximately caused, without contributory negligence on his part, you will find for the plaintiffs, and assess the amount of damages they are entitled to recover.

I instruct you that the defendant is entitled to have you consider upon the question of the probable value of the decedent's life, the uncertainty of life itself, the uncertainty of health, and the uncertainty of constant employment. It is your duty to take these elements into consideration.

I further instruct you that in considering the probable value of the life of George R. Wright to these plaintiffs, you have no right to take into consideration any possible opportunities that he might have had of acquiring wealth or fortune in the future.

There have been introduced in evidence mortality or expectancy tables for the purpose of showing the probable duration of life of the deceased, and also of each of the plaintiffs.

In determining the probable length of life the deceased would have enjoyed, you are entitled to consider those mortality or expectancy tables as evidence bearing on that question, and as tending to show the ordinary experience in such cases. You may also consider those tables relative to the probable duration of the life of the plaintiffs respectively, but only for the purpose and extent of ascertaining

whether their expectancy of life is or is not as great as that of the deceased. You cannot award damages to any of the plaintiffs for any period extending beyond the probable term of the life of the deceased.

It is alleged in the complaint in this action that the ages of the children of the deceased at the time of filing the complaint were eleven and thirteen years, respectively, and you are instructed that the pecuniary interest of children in the [70] life of their parent does not necessarily end at the age of majority; and in this case, if your verdict shall be for the plaintiff, you may allow for the probable loss of any benefit, if any, of a pecuniary value, which the children would probably have received from their father after the arrival at majority.

You have no right to take into consideration in fixing the amount of damages, any personal grief or mental distress or wounded feelings which plaintiffs to wit, the widow and children of said deceased, may have experienced by reason of the death of said George Reuben Wright. The sorrow and grief that his death may have caused them are not regarded by the law as proper things to be considered in a verdict for damages, and nothing can be added by way of damages on that account.

The verdict in a case of this kind is to be a practical one, not a sentimental one, and it is to be arrived at pursuant to the rules of law, and should fix the damages on no other basis whatever, except the pecuniary or money loss which the said widow and children may have sustained by reason of the death of George Reuben Wright. The plaintiffs can recover



nothing in this action by way of damages, except for actual pecuniary loss, and in passing upon this question of pecuniary loss, the jury are not allowed to speculate generally or indulge in presumption without regard to the general evidence in the case, but they should determine the question by the evidence which has been introduced before them.

In determining the amount of damages, it is your duty to take into consideration the loss sustained by the plaintiffs in being deprived of the support of the deceased and his comfort, and to consider the value of the father's services to the plaintiffs, his care and labor bestowed upon his children, his ability to care for them, train and assist them and his efforts for their welfare."

The foregoing were all of the instructions given the jury.

The defendant thereupon excepted to each and every one of the instructions given by the Court and each and every part thereof.

#### EXCEPTION NO. 11. [71]

#### **Instructions Requested by Defendant.**

#### EXCEPTION NO. 12.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

"You are instructed that the law is well settled that the railroad track of a steam railway must of itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains, and that if he sees an approaching train upon the track, or could have seen the same if he had looked, he must

not place himself in a dangerous position by attempting to cross in front of it, and if when the approaching train is in plain view he attempts to cross in front thereof, and an accident happens by which he is injured, no recovery can be had against the railroad company for such an accident.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give said instruction.

#### EXCEPTION NO. 13.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that the direct and approximate cause of the accident in which George Reuben Wright was killed was the contributory negligence and want of care of the deceased and the driver of the truck, and your verdict therefore will be in favor of the defendant.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give said instruction.

#### EXCEPTION NO. 14.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“If you find from the evidence in this case that either the deceased, George Reuben Wright, or the driver of the truck, [72] could have seen the train approaching the crossing at which the accident oc-

curred before they attempted to cross the track upon which the train was approaching, and if the accident occurred as the result of their attempting to cross in front of the approaching train while it was in plain view, then the plaintiffs are not entitled to recover against the defendant and your verdict will be in its favor."

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give said instruction.

#### EXCEPTION NO. 15.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

"You are further instructed that if you believe from the evidence that the direct and proximate cause of the accident was the attempt on the part of George Reuben Wright, deceased, and the driver of the truck, to cross the track in front of the approaching train, or if they had listened they could have heard it in time to have stopped their truck and prevented the accident, then you are instructed that the accident was occasioned by the negligence and want of care of George Reuben Wright and the driver of the truck and that the defendant was not liable, and your verdict accordingly will be in favor of the defendant."

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then

and there duly excepted to the refusal of the Court to give the said instruction.

EXCEPTION NO. 16.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that as George Reuben Wright and the driver of the truck, at the time of the accident were both men of mature years and were in full possession of their [73] senses, and if they had looked could have seen the approaching train in time to have prevented the accident, the engineer was entitled reasonably to believe that they knew of the approaching train and would, in obedience to the ordinary instinct of self-preservation, not attempt to cross the track, or pass in front of the train, but would take such steps as reasonable to prevent an accident, and the employees of the defendant company were not required to assume that they would continue in attempting to cross the track in front of the approaching train to a point which would endanger their lives and limbs, and that it was not negligence for the engineer or fireman, under the circumstances, to indulge the presumption that they would not attempt to cross the track in front of the train, but would stop and wait for the train to pass.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

EXCEPTION NO. 17.

Thereupon the defendant requested the Court in



writing to charge the jury as follows:

“You are further instructed that in crossing a track, which is a sign of danger in itself, the law does not entitle one to speculate as to whether he will be able to cross in safety before an approaching train, and if he makes the attempt and is not successful, then I charge you that such accident is the direct and proximate result of attempting to cross the track. If, therefore, you believe in the present case that the accident to the deceased was directly occasioned by the fact that he and the driver of the truck had negligently attempted to cross the track in front of the approaching train and the accident occurred as the result of such attempt, then I instruct you, as a matter of law, that the accident [74] was occasioned by the contributory negligence and want of care of the deceased and the driver of the truck, and your verdict will, therefore, be in favor of the defendant.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

#### EXCEPTION NO. 18.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“Passion, prejudice and sympathy are not to enter into your consideration of this case. It is your duty to judge this case uninfluenced by any consideration of passion or prejudice and unaffected by any sympathy whatsoever.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

EXCEPTION NO. 19.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“The fact that the Southern Pacific Company is a corporation is not to be considered by you in this case. It is your duty to give that defendant the same fair trial as if it were a private individual.”

Which instruction the Court thereupon declined to give.

And the defendant, thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

EXCEPTION NO. 20.

Thereupon the defendant requested the Court in writing to charge the jury as follows: [75]

“Before the plaintiff can recover, it must appear from the evidence that the accident resulting in the death of George Reuben Wright was caused by the negligence of the defendant, unmixed with any negligence of the deceased or the driver of the truck, for if negligence on the part of the deceased or the driver of the truck contributed in any manner, directly or approximately to the death of said George Reuben Wright, there can be no recovery, and your verdict must be for the defendant.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there excepted to the refusal of the Court to give the said instruction.

#### EXCEPTION NO. 21.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that a railroad track upon which trains are run is itself a warning to any person who has reached the years of discretion and who is possessed of ordinary intelligence, that it is not safe to cross it without the exercise of constant vigilance in order to be made aware of the approach of a train and thus be enabled to avoid receiving an injury, and the failure of such person so situated with reference to a railroad track to exercise such care and watchfulness and to make use of all his senses in order to avoid the danger incident to such situation is negligence and prevents recovery. If you find, therefore, that if either the deceased or the driver of the truck, in attempting to cross the railroad track in front of the approaching train which collided with said truck, failed to exercise such care and watchfulness, or to make use of all his senses in order to avoid the danger incident to crossing said track, then I instruct you that the plaintiffs cannot recover, and your verdict will be in favor of the defendant.”

Which instruction the Court thereupon declined to give. [76]

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

## EXCEPTION NO. 22.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that as a railroad track is a sign of danger in itself, that it was the duty of the deceased and of the driver of the truck, in approaching the track upon which the accident occurred, to exercise constant vigilance and watchfulness and care in order to see or hear an approaching train, and thus avoid injury, and if, for any reason, they could not see the approaching train because their vision was obstructed, they were required to use all the more vigilance for that reason, and in any event, the law cast upon them the duty to approach the track so slowly as to give them complete control of their truck and enable them to stop instantly if occasion required. If, therefore, you believe from the evidence that either George Reuben Wright or the driver of the truck, in attempting to cross the track in front of the approaching train, did not exercise the same caution herein stated, then they were guilty of negligence themselves and no recovery can be had against the defendant.”

( Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

## EXCEPTION NO. 23.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“If you believe from the evidence that either



George Reuben Wright, deceased, or the driver of the truck, either saw or heard the train approaching and undertook to cross ahead of it, that [77] such attempt is conclusive evidence of negligence on his part, and the plaintiffs cannot recover.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give said instruction.

#### EXCEPTION NO. 24.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that the defendant is not liable for the death of George Reuben Wright unless it occurred solely by its fault and negligence, and not in any degree through the fault or negligence of the deceased.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

#### EXCEPTION NO. 25.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that if you believe from the evidence that the approaching train was in plain view of either the deceased or the driver of the truck before they reached the track upon which the accident occurred, and that if either of them had

looked he could have seen it before they crossed the track, or if either of them had listened he could have heard the train approaching before they crossed the track, and that if either of them had looked and listened before attempting to cross the track, he could have seen and heard the approaching train and thus avoided any danger, and that while the train was so approaching in plain view of the deceased and the driver of the truck, they attempted to cross the track in front of the approaching train, and that by reason only of any such attempt the accident occurred resulting in the death of George Reuben Wright, then I instruct [78] you that such conduct on the part of the deceased and the driver of the truck was negligence and the plaintiffs cannot recover.”

Which instruction the Court thereupon declined to give.

And the defendant, thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

#### EXCEPTION NO. 26.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that damages in such a case as this can only be given for the actual pecuniary injury or loss suffered by the wife and children of the deceased. In other words, in a case such as the present, if you find that the plaintiffs are entitled to damages, then damages can only be given for the pecuniary injury or loss the wife and children have sustained, or will sustain, by the death of George Reuben Wright, and in this regard I charge you that

no damage can be given to the plaintiffs for the grief or sorrow or pain, or injury to their feelings, or for loss of society of the deceased, or for his pain or suffering, or for the loss of his comfort and protection. The law simply measures the injury complained of by the loss it has caused, or will cause, in dollars and cents. In passing upon this question you are not allowed to speculate or indulge in presumptions not warranted by the evidence, but you must determine this question solely by the evidence introduced before you. In passing upon the question of pecuniary injury or loss sustained by the plaintiff you must be governed solely by the evidence introduced; you must not indulge in conjectures or speculations not supported by the evidence."

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

#### EXCEPTION NO. 27.

Thereupon the defendant requested the Court in writing to charge the jury as follows: [79]

"You are further instructed that if you believe from the evidence that the employees of the defendant company failed to give the warning of the approach of the train either by blowing the whistle or ringing the bell, yet, if you further believe that under the instructions herein given you that either the deceased, or the driver of the truck, if he had looked could have seen, or if he had listened could have heard the approaching train in time to have avoided

the accident by the exercise of reasonable care, then the plaintiffs are not entitled to recover.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

#### EXCEPTION NO. 28.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“While it is true that the law permits the plaintiff to recover damages for the loss of the comfort, society and protection of the deceased, you must remember that such damages are in no way concerned with the question of their sorrow, grief or mental distress because of the loss of the deceased, and you must award plaintiffs nothing in this respect. The only amount that you can give under the law so far as the comfort, society and protection are concerned is such pecuniary loss as the widow and children of said deceased may have sustained with reference to those elements, and you must therefore examine the evidence upon the subject of comfort, society and protection to determine what pecuniary loss they sustained in that regard, if any, and you cannot award plaintiffs anything at all in this case on this head of damages in excess of such pecuniary loss.

I particularly caution you in this case, as a matter of justice to the defendant, that these plaintiffs, so far as comfort, society and protection to said widow and children are concerned, are not entitled to recover anything whatever from the defendant for any



personal [80] distress or grief or injured feeling, no matter how enduring they may be; it is only for comfort, society and protection insofar as those things stand for pecuniary loss that they can recover anything at all on this head."

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

#### EXCEPTION NO. 29.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

"You are instructed that the circumstance that the defendant Southern Pacific Company is a corporation must in no wise affect your verdict in this case any more than if it were an ordinary private citizen. In a court of justice like this, jurors should make no difference between a corporation and an individual. These plaintiffs and the defendant are entitled to justice, and the same justice, and in determining and fixing the amount of your verdict in this case you are always to remember that the defendant corporation cannot be taxed one dollar damages except in accordance with the rules of law, and it is only to the extent that damages are recoverable under the rules of law that any verdict can be rendered against the defendant. It is simply the pecuniary loss of the plaintiff, and nothing more, as such pecuniary loss is prescribed and defined by legal rules, that you can base a verdict upon this case."

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

EXCEPTION NO. 30.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that neither Mr. Wright nor Mr. Tucker had the right to depend upon the custom, or even the duty enjoined by law, of the engineer or fireman to give the customary signals of the approach of the train, as it was their duty, in approaching the crossing, to look and listen, irrespective of such signals. If, therefore, they could have seen or heard the approaching train if they had looked or listened in time to avoid the accident, then your verdict should be in favor of [81] the defendant, even if you further believe that no warning whatever was given of the approaching train by the employees of the Company.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

EXCEPTION NO. 31.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that if you believe from the evidence that the train was approaching

the crossing at an excessive rate of speed and in violation of the ordinance, yet, that fact is immaterial if you further believe that if Mr. Wright or Mr. Tucker had looked towards the approaching train, they could have seen it at any time sufficient to have prevented the accident, then the responsibility of the accident lies with Mr. Tucker and Mr. Wright, and your verdict must be in favor of the defendant."

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

#### EXCEPTION NO. 32.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

"You are further instructed that if you believe from the evidence that the employees of the defendant were negligent, that the train was going at an excessive rate of speed, that the whistle of the engine never blew nor the bell rang, and that no warning of any kind was given to Mr. Tucker or Mr. Wright by the engineer or fireman of the train, yet, if you believe from the evidence that Mr. Wright or Mr. Tucker could have seen or heard the approaching train in time to have avoided the accident, if they had looked or listened, then your verdict must be in favor of the defendant."

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then

and there duly excepted to the refusal of the Court to give the said instruction. [82]

EXCEPTION NO. 33.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that it was Mr. Wright’s duty, in approaching the crossing, equally with Mr. Tucker’s, to have looked and listened for the approaching train. If, therefore, you believe from the evidence, that if Mr. Wright had looked or listened at any time before the truck actually reached the track upon which the accident occurred, he could have seen or heard the train in time to have avoided the accident, then your verdict must be in favor of the defendant.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there excepted to the refusal of the Court to give the said instructions.

EXCEPTION NO. 34.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that Mr. Wright at the time of the accident was in charge and control of the truck, and therefore the negligence of Mr. Tucker at the time of the accident, if you find that he was negligent, is to be imputed and regarded as the negligence of Mr. Wright. If, therefore, you find under these instructions that Mr. Wright or Mr.



Tucker were negligent at the time of the accident, then your verdict must be in favor of the defendant.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there excepted to the refusal of the Court to give the said instructions.

#### EXCEPTION NO. 35.

Thereupon the defendant requested the Court in writing to charge the jury as follows:

“You are further instructed that the evidence in this case is not sufficient to justify a verdict in favor of the plaintiffs, [83] and you will therefore render a verdict in favor of the defendant.”

Which instruction the Court thereupon declined to give.

And the defendant thereupon, by its counsel, then and there duly excepted to the refusal of the Court to give the said instruction.

L. L. CORY,

Attorney for Defendant.

Due service of the within Bill of Exceptions is hereby admitted by copy this 23d day of June, 1916.

GALLAHER & ATEN,

FRANK KAUCHE,

Attorneys for Plaintiffs.

It is hereby stipulated by and between the parties to this action that the foregoing Bill of Exceptions is correct in all respects and that the same may be approved, allowed and settled and made a part of the record herein to be used by the defendant upon its

motion for a new trial herein and also upon appeal.

Dated, this 28th day of June, 1916.

GALLAHER & ATEN,

FRANK KAUCHE,

Attorneys for Plaintiff.

L. L. CORY,

Attorney for Defendant. [84]

The foregoing Bill of Exceptions is hereby allowed and settled as correct in all respects, and made a part of the record herein to be used on the motion of the defendant herein for a new trial and also upon appeal or writ of error to the Circuit Court of Appeals.

OSCAR A. TRIPPET,

Judge.

Settled, allowed, signed and filed July —, 1916.

\_\_\_\_\_,

Clerk.

\_\_\_\_\_,

Deputy Clerk.

[Endorsed]: 71-Civil. In the District Court of the United States, Southern District of California, Northern Division. Gertrude Wright et al., Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Defendant's Bill of Exceptions. Filed Jun. 29, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. L. L. Cory, Attorney at Law, First National Bank Building, Fresno, Cal., Attorney for Defendant. [85]

*In the District Court of the United States, Southern  
District of California, Northern Division.*

No. 71—CIVIL.

GERTRUDE WRIGHT and ORENE WRIGHT  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*.

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

**Petition for Writ of Error.**

The Southern Pacific Company, a corporation, the defendant in the above-entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered on the 5th day of May, 1916, a new trial of which cause was heretofore denied on the 23d day of October, 1916, comes now by L. L. Cory, its attorney, and files herewith an assignment of error and petitions said Court to allow said defendant to procure a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error

by the United States Circuit Court of Appeals for the Ninth Circuit.

L. L. CORY,

Attorney for Petitioner.

Due service of the foregoing Petition for Writ of Error is hereby admitted this 27th day of November, 1916.

GALLAHER & ATEN,

FRANK KAUCHE,

Attorneys for Plaintiffs. [86]

[Endorsed]: No. 71-Civil. In the District Court of the United States, Southern District of California, Northern Division. Gertrude Wright et al., Plaintiffs, vs. Southern Pacific Company, Defendant. Petition for Writ of Error. Filed Nov. 28, 1916, Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. L. L. Cory, Attorney at Law, Fresno, Cal., 410-414 Cory Bldg. [87]

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*In the District Court of the United States, Southern District of California, Northern Division.*

GERTRUDE WRIGHT and ORENE WRIGHT  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY (a Corporation),

Defendant.



**Assignment of Errors.**

Comes now the defendant above named and files the following statement of errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause, petition for which writ is filed at the same time with this assignment.

## 1.

That said Court erred in overruling the objection of counsel for defendant to the following question which was asked Fred Tucker, a witness for the plaintiff, upon direct examination, specified in the Bill of Exceptions as Exception No. 1, as follows:

“Mr. KAUKÉ.—Q. Did Mr. Wright have anything to do with the operating of the machine?

Mr. CORY.—Objected to as irrelevant, incompetent and immaterial, not tending to prove any issue in the case.

The COURT.—The objection is overruled.

(Question read.) A. None whatever.”

## 2.

That said Court erred in overruling the objection of counsel for defendant to the following question which was asked the said [88] witness, specified in the Bill of Exceptions as Exception No. 2, as follows:

“Mr. KAUKÉ.—Q. Did he assume, in other words, did he give you any directions or instructions or say anything to you as to how it should be operated at all? A. No, sir.

Mr. CORY.—Objected to as irrelevant, incompe-

tent and immaterial, calling for hearsay testimony.

The COURT.—The objection is overruled.

Mr. KAUKKE.—Your answer.     A. No, sir.”

3.

The Court erred in overruling the objection of counsel for defendant to the introduction in evidence of Section 17 of Ordinance No. 51 of the city of Selma, specified in the Bill of Exceptions as Exception No. 3, as follows:

“Mr. GALLAHER.—I have it. We desire to introduce in evidence, so that this book may not be retained here, Section 17 of Ordinance No. 51 of the city of Selma, commonly known and entitled as the misdemeanor ordinance of the city of Selma. We offer Section 17.

Mr. CORY.—We object to that as irrelevant, incompetent and immaterial, if the Court please, now shown to have been adopted in any manner at any meeting of said city trustees, or published as required by law, or duly authenticated in any way.

Mr. GALLAHER.—The statute providing for the keeping of an ordinance book in the State of California provides it shall be *prima facie* evidence as to the existence, force and effect of the ordinance as therein set forth.

The COURT.—The objection is overruled.

Mr. CORY.—We except.

Mr. GALLAHER.—We desire to read into evidence, so that the book may be returned, Section 17, appearing at page 197 of the [89] Book or Ordinances.

Mr. KAUKKE.—Mr. Cory, do you want the whole

ordinance read? Do you desire the whole ordinance read?

Mr. CORY.—No, I don't care anything about it.

Mr. GALLAHER.—(Reading:) 'Section 17. Any person who shall run or propel any railroad car, locomotive, hand-car, horse car or any train of cars in this town at a greater rate of speed than eight miles per hour, or in such manner as to endanger or obstruct the free passage of any public street, is guilty of a misdemeanor.' The certificate is: 'Passed at a regular session of the board of trustees of the town of Selma held this 26th day of December, 1896'—giving the vote and certified by the clerk. That is all."

4.

That said Court erred in overruling the objection of counsel for defendant to the following question which was asked said witness, Fred Tucker, and in refusing to strike out his answer thereto, specified in the Bill of Exceptions as Exception No. 4, as follows:

"Mr. KAUCHE.—This man, Mr. Wright, that was with you, if you know from knowledge you then had, or since obtained, what was his age, or about what at that time?

Mr. CORY.—I object to that as calling for the opinion of the witness. I suppose there are better ways of proving that, if the Court please.

The COURT.—Objection overruled.

A. I would judge Mr. Wright to be about 30 years old. I don't know what his age was.

Mr. CORY.—I move that the answer be stricken out, if the Court please.

The COURT.—Overruled.”

5.

That the Court erred in overruling the objection of counsel [90] for defendant to the following question which was asked the above-named witness, specified in the Bill of Exceptions as Exception No. 5, as follows:

“Mr. KAUKKE.—Q. Now, what was said and done between you and the owner of the truck and the man that let it be used as to what you were to do with reference to it?

Mr. CORY.—We object to that as irrelevant, incompetent and immaterial and calling for hearsay.

The COURT.—Overruled.

A. The conversation over the phone?

Q. Yes.

A. Mr. Phelan said he would rent Mr. Wright the truck for \$15 a day providing I would drive it, but he would not rent it to him, let him drive it, because he didn't know him, and didn't know whether he knew how to drive it or not, and he knew that I knew how to drive it.”

6.

That the Court erred in overruling the objection of counsel for defendant to the following question which was asked the witness Oscar Thurman Hess, specified in the Bill of Exceptions as Exception No. 6, as follows:

“Mr. KAUKKE.—Q. What rate of speed, as near as you could estimate from your observation of the



speed of the trains and automobiles was the train going when you first saw it?

Mr. CORY.—Objected to as irrelevant, incompetent and immaterial and the witness not shown to be competent.

The COURT.—Overruled.

The WITNESS.—Shall I answer?

The COURT.—Yes.

A. 30 miles.”

7.

That the Court erred in overruling the objection of counsel for defendant to the following question asked the witness Wade [91] Cargile, specified in the Bill of Exceptions as Exception No. 7, as follows:

“Mr. KAUKKE.—Q. Now, do you, from your knowledge of his affairs and the business that he transacted and the business that you transacted after his death and since up to December since then, know approximately what his net earnings would be or were from that business per month, after paying the running expenses of the business?

Mr. CORY.—One minute. I object to that as irrelevant, incompetent and immaterial and not a proper estimate on which to base damages, calling for the opinion of the witness and not seeking to elicit any fact.

The COURT.—He asks if he knows. You can answer that question yes or no.

A. Well, I can get pretty close to it.

Mr. KAUKKE.—Q. And what were his net earnings per month on an average, approximately?

Mr. CORY.—We make the same objection, if the Court please.

The COURT.—Objection overruled.

A. Well, something near, his net earnings were something near \$150 a month, I think.”

8.

That the Court erred in overruling the objection of counsel for defendant to the question asked the last above-named witness, specified in the Bill of Exception No. 8, as follows:

“Mr. KAUKÉ.—Q. Do you know after he had paid the running expenses, teams, feed, different expenses there might be of the wagon, the net income from the business there?

Mr. CORY.—One minute, I object to it as irrelevant, incompetent and immaterial and not a proper basis for damages, speculative and calling for the opinion of the witness.

The COURT.—Objection overruled. [92]

Mr. KAUKÉ.—You may answer.

A. \$175 a month.

Mr. KAUKÉ.—\$175 per month.

A. Yes, \$150 to \$175.”

9.

That the Court erred in overruling the objection of counsel for defendant to the question asked the said witness, specified in the Bill of Exceptions as Exception No. 9, as follows:

“Mr. KAUKÉ.—Q. Always at work. Now, what were his habits as to coming home and being in the society of his wife and children?

Mr. CORY.—Objected to as immaterial for any

purpose, if the Court please, not the basis of damage.

The COURT.—There is no allegation in his complaint as to the relations between him and his wife.

Mr. KAUKKE.—Well, the purpose of the question is, that, while we can recover only the pecuniary damages, the pecuniary damages are based upon loss of society and care and comforts, not anything, of course, for the sorrow, or injured feelings, and under the general allegation, the prayer for damages, we are quite sure we are entitled to prove the loss of society. In other words, if he was not kind and attentive to his family, it would be one thing that could be shown to the contrary, as to how much they have lost by this killing.

The COURT.—It has been customary, so far as my information goes, to allege in the complaint that the relations of husband and wife have been agreeable and pleasant—devoted or attentive to his wife and children, and all that sort of thing.

Mr. CORY.—I understand there must be an issue of that kind in order to entitle them to prove it.

Mr. KAUKKE.—While I have not the authority here to read to the Court, I am quite sure that is not the rule of pleading in this State.

The COURT.—Objection is overruled.

(Question read.) A. He was always there, only when his business called him away." [93]

10.

The Court erred in denying the motion of the defendant for a nonsuit, specified in the Bill of Exceptions as Exception No. 10, as follows:

The defendant made a motion for nonsuit, upon

the grounds that the evidence of the plaintiff showed beyond any substantial or other conflict that the accident complained of was caused solely and alone by the contributory negligence and want of care of the deceased; that it disclosed that the driver of the machine and the deceased had a clear and unobstructed view of the track upon which the train was approaching when they were a distance of 145 feet from the track on which the accident occurred, and if, during any portion of that distance, either the deceased or the driver had looked in the direction from which the train was approaching, they could have seen it and thus avoided the accident.

After argument, the motion was submitted to the Court for decision and was by the Court overruled, to which ruling the defendant then and there excepted, as set forth in said Exception No. 2 of the Bill of Exceptions.

11.

That the Court erred in giving the jury the following instructions, specified in the Bill of Exceptions as Exception No. 11, as follows:

The COURT.—“Gentlemen of the jury, every case should be tried according to law and the evidence that is admitted in the case. This is an action of negligence and negligence is defined by the law. You should not be influenced by reason of passion, prejudice or sympathy. It is your duty to judge this case without any such considerations; you should not be prejudiced against the defendant by reason of it being a corporation, and it should



have just as fair a trial as if it were a private individual.

Negligence is the omission to do something, which a reasonably prudent man, guided by those considerations which [94] usually regulate the conduct of human affairs would do, or is the doing of something which a prudent and reasonable man would not do. It is not intrinsic or absolute but is always relative to some circumstance of time, place or person.

Negligence is of no consequence unless it was the proximate cause of the injury.

The proximate cause of an injury is that cause which in natural and continuous sequence produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets the other causes in operation.

This definition of negligence as it relates to the cause of an accident, applies alike to the defendant and to the conduct of the deceased.

When we speak of contributory negligence of the deceased, we mean the kind of negligence above defined.

The plaintiffs have the burden of proving that the defendant was guilty of negligence. The burden is sustained when you are satisfied that the greater weight of the evidence is with the plaintiffs. When you come to consider the question of contributory negligence of the deceased, the burden of proof is upon the defendant to show that the deceased was guilty of contributory negligence, and you must be satisfied that the weight of evidence shows that the

deceased was guilty of contributory negligence before you can decide that he was.

The question whether or not there was negligence in a particular case should be determined from the circumstances and conditions, as shown in evidence, at the time, surrounding the person against whom the negligence is charged.

The negligence of a servant acting within the scope of his employment is the negligence of the master.

You are further instructed that it is the duty of a railroad company, where its tracks cross the streets of a city, to take reasonable precautions to protect against injury from the [95] movement of its engines and cars, travelers upon the same highway.

Section 486 of the Civil Code of this State provides as follows: 'A bell, of at least twenty pounds weight, must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed such street, road, or highway; or, a steam whistle must be attached and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same.

The corporation is liable for all damages sustained by any person, and caused by its locomotives, trains, or cars, when the provisions of this section are not complied with.

You are therefore instructed that, should you find from the evidence in this case that on approaching the crossing in question at the time of the accident,

there was at no time any bell rung or whistle sounded, or other warning signal given by the defendant, then such failure on the part of the defendant constituted presumptive negligence.

An ordinance of the city of Selma, fixing the maximum rate of speed at which railroad trains may be operated within the corporate limits of the city, has been introduced in evidence, and, upon the question of the alleged negligence of the defendant, you are instructed that if you find that the defendant failed to comply with such municipal ordinance at the time in question, then such failure on its part constituted presumptive negligence.

Before the plaintiff can recover, it must appear from the evidence that the accident resulting in the death of George R. Wright was caused by the negligence of the defendant, unmixed with any negligence of the deceased, for if negligence on the part of the deceased contributed in any manner, directly or approximately, to his death, there can be no recovery. [96]

You are instructed that the law is well settled that the railroad track of a steam railway must of itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains, and that, if he sees an approaching train upon the track, or could have seen the same if he had looked, he must not place himself in a dangerous position by attempting to cross in front of it, and if when the approaching train is in plain view he attempts to cross in front thereof, and an accident happens by

which he is injured, he is guilty of contributory negligence.

You are further instructed that there is no evidence before this jury that either the fireman or engineer had any actual knowledge or notice that either Mr. Tucker or Mr. Wright were crossing or attempting to cross the railroad track in front of the approaching train, and this jury can draw no inference of negligence on the part of the defendant because of the fact that the fireman or engineer might have known of the danger in which Mr. Tucker and Mr. Wright were placed. In other words, the last chance doctrine, so-called, has no application to the facts of this case, and you are to determine this case solely under the instructions given you by the Court.

You are further instructed that the engineer and fireman had a right to assume that the driver of the truck was in possession of his faculties and would remain in a place of safety and not recklessly expose himself or Mr. Wright to danger.

It is alleged in defendant's answer in this case that the alleged death of said George R. Wright was occasioned solely and alone because of the carelessness and want of care of said deceased and the person driving and in charge of the said automobile truck.

If you find that the automobile truck was operated and driven solely by the witness Tucker, and that the deceased had no [97] control over the operation of the truck, or no right to exercise control over the same, and that he did not exercise any supervision or control over the same, then you are



further instructed that in such case the negligence of Tucker (if he was negligent) is not to be imputed to the deceased so as to constitute contributory negligence on his part; but that to sustain the defense of contributory negligence, the defendant must prove or the evidence must show personal failure, on the part of the deceased to exercise ordinary care.

In other words, if you find that the deceased, Wright, was riding in the automobile truck, driven by the witness Tucker, and that he, Wright, had neither control of nor the right to control, such driver, and that he was not exercising or assuming control over the truck or such driver at the time of the accident, then, to sustain the defense of contributory negligence on the part of the deceased, it must appear from the evidence that he, personally, as distinguished from the driver of the truck failed to exercise ordinary care at and immediately prior to the time of the accident which caused his death. But deceased was required to exercise ordinary care in approaching said crossing.

If you believe from the evidence that the defendant was negligent as alleged in the complaint, and that the death of the deceased was thereby approximately caused, without contributory negligence on his part, you will find for the plaintiffs, and assess the amount of damages they are entitled to recover.

I instruct you that the defendant is entitled to have you consider upon the question of the probable value of the decedent's life, the uncertainty of life itself, the uncertainty of health, and the uncertainty

of constant employment. It is your duty to take these elements into consideration.

I further instruct you that in considering the probable value of the life of George R. Wright to these plaintiffs, you have no right to take into consideration any possible opportunities [98] that he might have had of acquiring wealth or fortune in the future.

There have been introduced in evidence mortality or expectancy tables for the purpose of showing the probable duration of life of the deceased, and also of each of the plaintiffs.

In determining the probable length of life the deceased would have enjoyed, you are entitled to consider those mortality or expectancy tables as evidence bearing on that question, and as tending to show the ordinary experience in such cases. You may also consider these tables relative to the probable duration of the life of the plaintiffs respectively, but only for the purpose and extent of ascertaining whether their expectancy of life is or is not as great as that of the deceased. You cannot award damages to any of the plaintiffs for any period extending beyond the probable term of the life of the deceased.

It is alleged in the complaint in this action that the ages of the children of the deceased at the time of filing the complaint were eleven and thirteen years, respectively, and you are instructed that the pecuniary interest of children in the life of their parent does not necessarily end at the age of majority; and in this case, if your verdict shall be for

the plaintiff, you may allow for the probable loss of any benefit, if any, of a pecuniary value, which the children would probably have received from their father after the arrival at majority.

You have no right to take into consideration in fixing the amount of damages, any personal grief or mental distress or wounded feelings which the plaintiffs, to wit, the widow and children of said deceased, may have experienced by reason of the death of said George Reuben Wright. The sorrow and grief that his death may have caused them are not regarded by the law as proper things to be considered in a verdict for damages, and nothing can be added by way of damages on that account.

The verdict in a case of this kind is to be a practical one, [99] not a sentimental one, and it is to be arrived at pursuant to the rules of law, and should fix the damages on no other basis whatever, except the pecuniary or money loss which the said widow and children may have sustained by reason of the death of George Reuben Wright. The plaintiffs can recover nothing in this action by way of damages, except for actual pecuniary loss, and in passing upon this question of pecuniary loss, the jury are not allowed to speculate generally or indulge in presumption without regard to the general evidence in the case, but they should determine the question by the evidence which has been introduced before them.

In determining the amount of damages, it is your duty to take into consideration the loss sustained by the plaintiffs in being deprived of the support of the deceased and his comfort, and to consider the value

of the father's services to the plaintiffs, his care and labor bestowed upon his children, his ability to care for them, train and assist them and his efforts for their welfare."

The foregoing were all of the instructions given the jury.

The defendant thereupon excepted to each and every one of the instructions given by the Court and each and every part thereof, as set forth in Exception No. 11 of the Bill of Exceptions.

12.

The Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 12 of said Bill of Exceptions, as follows:

"You are instructed that the law is well settled that the railroad track of a steam railway must of itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains, and that if he sees an approaching train upon the track, or could have seen the same if he had looked, he must not place himself in a dangerous position by attempting to cross in front of it, and if when the approaching train is in plain view he attempts to cross in front thereof, and an accident happens by [100] which he is injured, no recovery can be had against the railroad company for such an accident."

13.

The Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 13 of said Bill of Exceptions, as follows:



“You are further instructed that the direct and approximate cause of the accident in which George Reuben Wright was killed was the contributory negligence and want of care of the deceased and the driver of the truck, and your verdict therefore will be in favor of the defendant.”

## 14.

The Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 14 of said Bill of Exceptions, as follows:

“If you find from the evidence in this case that either the deceased, George Reuben Wright, or the driver of the truck, could have seen the train approaching the crossing at which the accident occurred before they attempted to cross the track upon which the train was approaching, and if the accident occurred as the result of their attempting to cross in front of the approaching train while it was in plain view, then the plaintiffs are not entitled to recover against the defendant and your verdict will be in its favor.”

## 15.

The Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 15 of said Bill of Exceptions, as follows:

“You are further instructed that if you believe from the evidence that the direct and proximate cause of the accident was the attempt on the part of George Reuben Wright, deceased, and the driver of the truck, to cross the track in front of the [101]

approaching train, or if they had listened they could have heard it in time to have stopped their truck and prevented the accident, then you are instructed that the accident was occasioned by the negligence and want of care of George Reuben Wright and the driver of the truck and that the defendant was not liable, and your verdict accordingly will be in favor of the defendant.”

## 16.

The Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 16 of said Bill of Exceptions, as follows:

“You are further instructed that as George Reuben Wright and the driver of the truck, at the time of the accident were both men of mature years and were in full possession of their senses, and if they had looked could have seen the approaching train in time to have prevented the accident, the engineer was entitled reasonably to believe that they knew of the approaching train and would, in obedience to the ordinary instinct of self-preservation, not attempt to cross the track, or pass in front of the train, but would take such steps as reasonable to prevent an accident, and the employees of the defendant company were not required to assume that they would continue in attempting to cross the track in front of the approaching train to a point which would endanger their lives and limbs, and that it was not negligence for the engineer or fireman, under the circumstances, to indulge the presumption that they would not attempt to cross the track in front of the

train, but would stop and wait for the train to pass.”

## 17.

The Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 17 of said Bill of Exceptions, as follows:

“You are further instructed that in crossing a track, which [102] is a sign of danger in itself, the law does not entitle one to speculate as to whether he will be able to cross in safety before an approaching train, and if he makes the attempt and is not successful, then I charge you that such accident is the direct and proximate result of attempting to cross the track. If, therefore, you believe in the present case that the accident to the deceased was directly occasioned by the fact that he and the driver of the truck had negligently attempted to cross the track in front of the approaching train and the accident occurred as the result of such attempt, then I instruct you, as a matter of law, that the accident was occasioned by the contributory negligence and want of care of the deceased and the driver of the truck, and your verdict will, therefore, be in favor of the defendant.”

## 18.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 18 of said Bill of Exceptions, as follows:

“Passion, prejudice and sympathy are not to enter into your consideration of this case. It is your duty to judge this case uninfluenced by any consideration

of passion or prejudice and unaffected by any sympathy whatsoever.”

## 19.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 19 of said Bill of Exceptions; as follows:

“The fact that the Southern Pacific Company is a corporation is not to be considered by you in this case. It is your duty to give that defendant the same fair trial as if it were a private individual.”

## 20.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception [103] No. 20 of said Bill of Exceptions, as follows:

“Before the plaintiff can recover, it must appear from the evidence that the accident resulting in the death of George Reuben Wright was caused by the negligence of the defendant, unmixed with any negligence of the deceased or the driver of the truck, for if negligence on the part of the deceased or the driver of the truck contributed in any manner, directly or approximately to the death of said George Reuben Wright, there can be no recovery, and your verdict must be for the defendant.”

## 21.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 21 of said Bill of Exceptions, as follows:

“You are further instructed that a railroad track



upon which trains are run is itself a warning to any person who has reached the years of discretion and who is possessed of ordinary intelligence, that it is not safe to cross it without the exercise of constant vigilance in order to be made aware of the approach of a train and thus enabled to avoid receiving an injury, and the failure of such person so situated with reference to a railroad track to exercise such care and watchfulness and to make use of all his senses in order to avoid the danger incident to such situation is negligence and prevents recovery. If you find, therefore, that if either the deceased or the driver of the truck, in attempting to cross the railroad track in front of the approaching train which collided with said truck, failed to exercise such care and watchfulness, or to make use of all his senses in order to avoid the danger incident to crossing said track, then I instruct you that the plaintiffs cannot recover, and your verdict will be in favor of the defendant."

## 22.

That the Court erred in refusing to charge the jury as [104] requested in writing by the defendant, as set forth in Exception No. 22 of said Bill of Exceptions, as follows:

"You are further instructed that as a railroad track is a sign of danger in itself, that it was the duty of the deceased and of the driver of the truck, in approaching the track upon which the accident occurred, to exercise constant vigilance and watchfulness and care in order to see or hear an approaching train, and thus avoid injury, and if, for any rea-

son, they could not see the approaching train because their vision was obstructed, they were required to use all the more vigilance for that reason, and in any event, the law cast upon them the duty to approach the track so slowly as to give them complete control of their truck and enable them to stop instantly if occasion required. If, therefore, you believe from the evidence that either George Reuben Wright or the driver of the truck, in attempting to cross the track in front of the approaching train, did not exercise the same caution herein stated, then they were guilty of negligence themselves and no recovery can be had against the defendant."

## 23.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 23 of said Bill of Exceptions, as follows:

"If you believe from the evidence that either George Reuben Wright, deceased, or the driver of the truck, either saw or heard the train approaching and undertook to cross ahead of it, that such attempt is conclusive evidence of negligence on his part, and the plaintiffs cannot recover."

## 24.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 24 of said Bill of Exceptions, as follows:

"You are further instructed that the defendant is not liable [105] for the death of George Reuben Wright unless it occurred solely by its fault and neg-

ligence, and not in any degree through the fault or negligence of the deceased."

## 25.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 25 of said Bill of Exceptions, as follows:

"You are further instructed that if you believe from the evidence that the approaching train was in plain view of either the deceased or the driver of the truck before they reached the track upon which the accident occurred, and that if either of them had looked he could have seen it before they crossed the track, or if either of them had listened he could have heard the train approaching before they crossed the track, and that if either of them had looked and listened before attempting to cross the track, he could have seen and heard the approaching train and thus avoided any danger, and that while the train was so approaching in plain view of the deceased and the driver of the truck, they attempted to cross the track in front of the approaching train, and that by reason only of any such attempt the accident occurred resulting in the death of George Reuben Wright, then I instruct you that such conduct on the part of deceased and the driver of the truck was negligence and the plaintiffs cannot recover."

## 26.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 26 of said Bill of Exceptions, as follows:

“You are further instructed that damages in such a case as this can only be given for the actual pecuniary injury or loss suffered by the wife and children of the deceased. In other words, in a case such as the present, if you find that the plaintiffs are entitled to damages, then damages can only be given for the pecuniary injury or loss the wife and children have sustained, or will sustain, [106] by the death of George Reuben Wright, and in this regard I charge you that no damage can be given to the plaintiffs for the grief or sorrow, or pain, or injury to their feelings, or for loss of society of the deceased, or for his pain or suffering, or for the loss of his comfort and protection. The law simply measures the injury complained of by the loss it has caused, or will cause, in dollars and cents. In passing upon this question you are not allowed to speculate or indulge in presumptions not warranted by the evidence, but you must determine this question solely by the evidence introduced before you. In passing upon the question of pecuniary injury or loss sustained by the plaintiff you must be governed solely by the evidence introduced; you must not indulge in conjectures or speculations not supported by the evidence.”

## 27.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 27 of said Bill of Exceptions, as follows:

“You are further instructed that if you believe from the evidence that the employees of the defendant company failed to give the warning of the ap-



proach of the train either by blowing the whistle or ringing the bell, yet, if you further believe that under the instructions herein given you that either the deceased, or the driver of the truck, if he had looked could have seen, or if he had listened could have heard the approaching train in time to have avoided the accident by the exercise of reasonable care, then the plaintiffs are not entitled to recover.”

## 28.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 28 of said Bill of Exceptions, as follows:

“While it is true that the law permits the plaintiff to recover damages for the loss of the comfort, society and protection of the deceased, you must remember that such damages are in no way concerned [107] with the question of their sorrow, grief or mental distress because of the loss of the deceased, and you must award plaintiffs nothing in this respect. The only amount that you can give under the law so far as the comfort, society and protection are concerned is such pecuniary loss as the widow and children of said deceased may have sustained with reference to those elements, and you must therefore examined the evidence upon the subject of comfort, society and protection to determine what pecuniary loss they sustained in that regard, if any, and you cannot award plaintiffs anything at all in this case on this head of damages in excess of such pecuniary loss.

I particularly caution you in this case, as a matter

of justice to the defendant, that these plaintiffs, so far as comfort, society and protection to said widow and children are concerned, are not entitled to recover anything whatever from the defendant for any personal distress or grief or injured feelings, no matter how enduring they may be; it is only for comfort, society and protection insofar as these things stand for pecuniary loss that they can recover anything at all on this head."

## 29.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 29 of said Bill of Exceptions as follows:

"You are instructed that the circumstances that the defendant Southern Pacific Company is a corporation must in no wise affect your verdict in this case any more than if it were an ordinary private citizen. In a court of justice like this, jurors should make no difference between a corporation and an individual. The plaintiffs and the defendant are entitled to justice, and the same justice, and in determining and fixing the amount of your verdict in this case you are always to remember that the defendant corporation cannot be taxed one dollar damages except in accordance with the rules of law, and it is only to the extent that damages are recoverable under [108] the rules of law that any verdict can be rendered against the defendant. It is simply the pecuniary loss of the plaintiff, and nothing more, as such pecuniary loss is prescribed and defined by legal rules, that you can base a verdict in this case."

## 30.

That the Court erred in refusing to charge the jury as requested in writing by the defendant as set forth in Exception No. 30 of said Bill of Exceptions, as follows:

“You are further instructed that neither Mr. Wright nor Mr. Tucker had the right to depend upon the custom, or even the duty enjoined by law, of the engineer or fireman to give the customary signals of the approach of the train, as it was their duty, in approaching the crossing, to look and listen, irrespective of such signals. If, therefore, they could have seen or heard the approaching train if they had looked or listened in time to avoid the accident, then your verdict should be in favor of the defendant, even if you further believe that no warning whatever was given of the approaching train by the employees of the company.”

## 31.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 31 of said Bill of Exceptions, as follows:

“You are further instructed that if you believe from the evidence that the train was approaching the crossing at an excessive rate of speed and in violation of the ordinance, yet, that fact is immaterial if you further believe that if Mr. Wright or Mr. Tucker had looked towards the approaching train, they could have seen it at any time sufficient to have prevented the accident, then the responsibility of the

accident lies with Mr. Tucker and Mr. Wright, and your verdict must be in favor of the defendant."

32.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 32 [109] of said Bill of Exceptions, as follows:

"You are further instructed that if you believe from the evidence that the employees of the defendant were negligent, that the train was going at an excessive rate of speed, that the whistle of the engine never blew nor the bell rang, and that no warning of any kind was given to Mr. Tucker or Mr. Wright by the engineer or fireman of the train, yet, if you believe from the evidence that Mr. Wright or Mr. Tucker could have seen or heard the approaching train in time to have avoided the accident, if they had looked or listened, then your verdict must be in favor of the defendant."

33.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 33 of said Bill of Exceptions, as follows:

"You are further instructed that it was Mr. Wright's duty, in approaching the crossing, equally with Mr. Tucker's, to have looked and listened for the approaching train. If, therefore, you believe from the evidence, that if Mr. Wright had looked or listened at any time before the truck actually reached the track upon which the accident occurred, he could have seen or heard the train in time to have



avoided the accident, then your verdict must be in favor of the defendant.”

## 34.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 34 of said Bill of Exceptions, as follows:

“You are further instructed that Mr. Wright at the time of the accident was in charge and control of the truck, and therefore the negligence of Mr. Tucker at the time of the accident, if you find that he was negligent, is to be imputed and regarded as the negligence of Mr. Wright. If, therefore, you find under these instructions that Mr. Wright or Mr. Tucker were negligent at the time of the accident, then your verdict must be in favor of the defendant.” [110]

## 35.

That the Court erred in refusing to charge the jury as requested in writing by the defendant, as set forth in Exception No. 35 of said Bill of Exceptions, as follows:

“You are further instructed that the evidence in this case is not sufficient to justify a verdict in favor of the plaintiffs, and you will therefore render a verdict in favor of the defendant.”

Dated this 27th day of November, 1916.

L. L. CORY,  
Attorney for Defendant.

Due service of the foregoing Assignment of Errors is hereby admitted by copy this 27th day of November, 1916.

GALLAHER & ATEN,  
FRANK KAUKÉ,  
Attorneys for Plaintiffs. [111]

[Endorsed]: No. 71—Civil. In the District Court of the United States, Southern District of California, Northern Division. Gertrude Wright et al., Plaintiffs, vs. Southern Pacific Company, Defendant. Assignment of Errors. Filed Nov. 28, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. L. L. Cory, Attorney at Law, First National Bank Building, Fresno, Cal., 410-414 Cory Bldg. [112]

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*In the District Court of the United States, Southern District of California, Northern Division.*

GERTRUDE WRIGHT and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

**Order Allowing Writ of Error.**

Upon motion of L. L. Cory, attorney for defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that a writ

of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the verdict and judgment heretofore entered herein.

Dated this 28th day of November, 1916.

OSCAR A. TRIPPET,

Judge.

[Endorsed]: No. 71—Civil. In the District Court of the United States, Southern District of California, Northern Division. Gertrude Wright et al., Plaintiffs, vs. Southern Pacific Company, Defendant. Order Allowing Writ of Error. Filed Nov. 28, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. L. L. Cory, Attorney at Law, Fresno, Cal., 410-414 Cory Bldg. [113]

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*In the District Court of the United States, for the Northern Division, of the Southern District of California.*

No. —.

GERTRUDE WRIGHT and ORENE WRIGHT,  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

Defendant.

**Supersedeas Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS:

That we, Southern Pacific Company, a Corporation, as principal, and United States Fidelity and Guaranty Company, a Corporation, duly organized and existing under and by virtue of the laws of the State of Maryland, for the purpose of making and guaranteeing and becoming surety upon bonds or undertakings required or authorized by law and as such corporation authorized to do business and doing business in the State of California and elsewhere, as surety, are held and firmly bound unto the plaintiffs in the above-entitled cause, and to each of them, in the sum of twelve thousand dollars (\$12,000) to be paid to the said plaintiffs, their and each of their heirs, executors, administrators and assigns, for the payment of which sum well and truly to be made, we bind ourselves and each of us, and our and each of our successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and dated this 25th day of November, 1916. [114]

WHEREAS, lately at a regular term of the District Court of the United States for the Northern Division of the Southern District of California, a final judgment was on or about the fifth day of May, 1916, rendered and entered in the above-entitled cause against said Southern Pacific Company, a corporation, for the sum of twelve thousand five hun-



dred dollars (\$12,500), together with legal interest thereon and costs of suit; and

WHEREAS, said Southern Pacific Company intends to and is about to apply for the allowance of a writ of error, returnable to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse said judgment of said District Court of the United States in said cause and to file said writ of error, when obtained, in the clerk's office of said court, and to apply for the issuance of a citation on said writ of error directed to said plaintiffs in said cause, citing them to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city and county of San Francisco, in the State of California, according to law within thirty (30) days from the date of said citation;

NOW, the condition of the above obligation is such that if the said Southern Pacific Company, a corporation, shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation shall be void, otherwise the same shall be and remain in full force and effect.

[Seal] SOUTHERN PACIFIC COMPANY.

By G. L. KING,  
Assistant Secretary.

UNITED STATES FIDELITY AND GUAR-  
ANTY COMPANY.

[Seal] By H. V. D. JOHNS,  
Attorney in Fact.

And W. S. ALEXANDER,  
Attorney in Fact. [115]

State of California,

City and County of San Francisco,—ss.

On this 25th day of November, 1915, before me, E. B. Ryan, a notary public in and for the city and county of San Francisco, duly commissioned and sworn, personally appeared G. L. King, known to me to be the assistant secretary of Southern Pacific Company, the corporation described in and that executed the foregoing bond, and acknowledged to me that said corporation executed the said bond.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the city and county of San Francisco, State of California, the day and year in this certificate first above written.

[Seal]

E. B. RYAN,

Notary Public in and for the City and County of San Francisco, State of California.

State of California,

City and County of San Francisco,—ss.

On this 25th day of November, 1915, before me, W. J. Cleveland, a notary public in and for the said city and county of San Francisco, State of California, duly commissioned and sworn, personally appeared H. V. D. Johns, and W. S. Alexander, known to me to be the persons whose names are subscribed to the foregoing instrument as attorneys in fact for United States Fidelity and Guaranty Company, and they acknowledged to me that they subscribed the name of United States Fidelity and Guaranty Com-

pany thereto as principal, and their own names as attorneys in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and my official seal, at my office in the city and county of San Francisco, State of California, the day and year in this certificate first above written.

[Seal]

W. J. CLEVELAND,

Notary Public in and for the City and County of San Francisco, State of California. [116]

The above and foregoing bond upon writ of error is hereby approved and the same shall operate as a supersedeas.

Dated November 28th, 1916.

OSCAR A. TRIPPET,

United States District Judge.

[Endorsed]: No. 71—Civil. In the District Court of the United States, Southern District of California, Northern Division. Gertrude Wright and Orene Wright and Ora Wright, by Gertrude Wright, Their Guardian *ad Litem*, Plaintiffs, vs. Southern Pacific Company, a Corporation, Defendant. Supersedeas Bond on Writ of Error. Filed Nov. 28, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. ———, Attorney for Defendant, 828 Flood Building, San Francisco, Cal. [117]

UNITED STATES OF AMERICA.

*District Court of the United States, Southern District of California, Northern Division.*

Clerk's Office.

No. 71—CIVIL.

GERTRUDE WRIGHT et al.,

Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY.

**Praeipe for Certified Copy of Transcript of Record  
on Writ of Error.**

To the Clerk of Said Court:

Sir: Please issue a certified Transcript of the Record on Writ of Error in the above-entitled case, to consist of the following papers, viz:

The Judgment-roll.

Bill of Exceptions.

Petition for Writ of Error.

Assignment of Errors.

Order Allowing Writ of Error.

Bond on Writ of Error.

Writ of Error.

Citation.

Praeipe for Transcript.

L. L. CORY,

Attorney for Defendant and Plaintiff in Error.

[Endorsed]: No. 71—Civil. U. S. District Court, Southern District of California, Northern Division. Gertrude Wright et al., Plaintiffs, vs. Southern



Pacific Company, Defendant. Praeipe for Certified Copy of Transcript of Record on Writ of Error. Filed Dec. 30, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. [118]

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*In the District Court of the United States of America, in and for the Southern District of California, Northern Division.*

No. 71—CIVIL.

GERTRUDE WRIGHT, and ORENE WRIGHT  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, Their Guardian *ad Litem*,  
Plaintiffs,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,  
Defendant.

**Certificate of Clerk U. S. District Court to Transcript  
of Record.**

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and eighteen typewritten pages, numbered from 1 to 118, inclusive, and comprised in one volume, to be a full, true and correct copy of the Judgment-roll, Bill of Exceptions, Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, Supersedeas Bond on Writ of Error and Praeipe for Certified Copy of Transcript of Record on Writ of Error in the above

and therein entitled action, and that the same together constitute the record in said action as specified in the said Praecipe filed in my office on behalf of the plaintiff in error by their attorney of record.

I do further certify that the cost of the foregoing record is \$67.20, the amount whereof has been paid by me by the Southern Pacific Company, a corporation, the plaintiff in error herein. [119]

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, this 26th day of January, in the year of our Lord one thousand nine hundred and seventeen and of our Independence the one hundred and forty-first.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California. [120]

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[Endorsed]: No. 2942. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a Corporation, Plaintiff in Error, vs. Gertrude Wright and Orene Wright and Ora Wright, by Gertrude Wright, Their Guardian, *ad Litem*, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States

District Court of the Southern District of California,  
Northern Division.

Filed February 26, 1917.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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*United States Circuit Court of Appeals for the  
Ninth Circuit.*

THE SOUTHERN PACIFIC COMPANY,  
Plaintiff in Error,

vs.

GERTRUDE WRIGHT et al.,  
Defendants in Error.

**Order Extending Time to March 1, 1917, to File  
Record and Docket Cause.**

Good cause appearing therefor, it is hereby ordered, that the time within which the plaintiff in error in the above-entitled action may file record and docket cause in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby is extended to and including the 1st day of March, 1917.

Los Angeles, California, December 23, 1916.

TRIPPET,  
District Judge.

[Endorsed]: No. 2942. United States Circuit Court of Appeals for the Ninth Circuit. The Southern Pacific Company, Plaintiff in Error, vs. Gertrude Wright et al., Defendants in Error. Order Extending Time to File Record and Docket Cause to March 1st, 1917. Filed Dec. 27, 1916. F. D. Monckton. Refiled Feb. 26, 1917. F. D. Monckton, Clerk.





No. 2942

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY,  
a corporation,

*Plaintiff in Error,*

VS.

GERTRUDE WRIGHT and ORENE  
WRIGHT and ORA WRIGHT, by  
GERTRUDE WRIGHT, their  
Guardian *ad Litem*,

*Defendants in Error.*

## BRIEF OF PLAINTIFF IN ERROR

IN ERROR TO THE UNITED STATES DISTRICT COURT  
OF THE SOUTHERN DISTRICT OF CALIFORNIA,  
NORTHERN DIVISION

L. L. CORY,

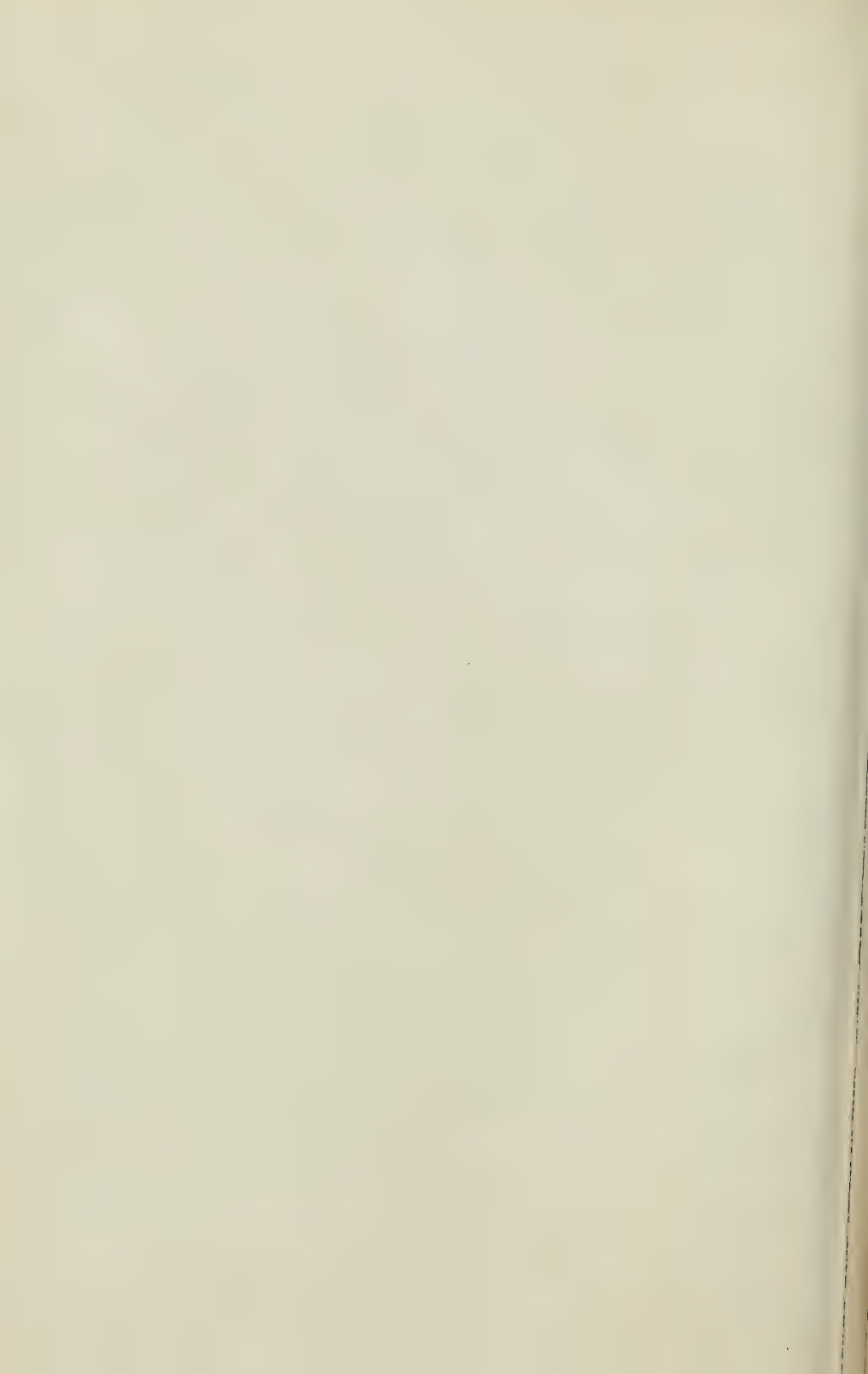
ELMER WESTLAKE,

*Attorneys for Plaintiff in Error.*

**Filed**

MAY 3 1917

F. J. Monckton.



No. 2942

# United States Circuit Court of Appeals

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FOR THE NINTH CIRCUIT

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SOUTHERN PACIFIC COMPANY,  
a corporation,

*Plaintiff in Error,*

vs.

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*Defendants in Error.*

## BRIEF OF PLAINTIFF IN ERROR

IN ERROR TO THE UNITED STATES DISTRICT COURT  
OF THE SOUTHERN DISTRICT OF CALIFORNIA,  
NORTHERN DIVISION

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### STATEMENT OF CASE

The present writ of error is brought for the purpose of reviewing a judgment of the trial court based upon a verdict of the jury awarding the defendants in error the sum of \$12,000, and against the plaintiff in error, for damages alleged to have



been suffered by them because of the death of George R. Wright, the husband and father of the defendants respectively, alleged to have been caused by the negligent acts of the Southern Pacific Company, the plaintiff in error.

The suit was originally commenced in the Superior Court of the County of Fresno by the widow and minor children, but upon proper proceedings had was removed to the District Court in and for the Southern District of California, Northern Division. The case came on regularly for trial, resulting on May 5th, 1916, in a verdict as stated, from which verdict and judgment this writ is prosecuted.

The facts out of which this litigation arose are briefly these:

The deceased, George R. Wright, met his death on May 22nd, 1914, while attempting to cross the track of the Southern Pacific Company at a point where Arrant Street crosses the tracks of the plaintiff in error in Selma, California. At that particular place there were four tracks, two of them East of the main line and one West of the main line. The accident occurred upon the main line, at about 9 o'clock on the morning of May 22, 1914. The deceased, with one Fred Tucker, was riding in an automobile truck which the deceased had rented of the owner in Fresno, with the understanding that Fred Tucker, who was familiar with the machine, should drive it. Incidentally, Fred Tucker was demonstrating the machine to the deceased as a possible purchaser. They had been to a point North

of Selma to fill the car with distillate at the Standard Oil Works, then proceeded in a Southerly direction on the Easterly side of said tracks and parallel therewith for about 1400 feet, where they commenced to turn to the right for the purpose of crossing the tracks of the company at Arrant street. The truck was what is known as a  $3\frac{1}{2}$ -ton (carrying capacity) Kelly truck, left-hand drive, so that the deceased, at and just prior to the time of the accident, was on the side nearer the railroad tracks. At all times the view was wholly unobstructed. The train that collided with the truck was a regular passenger train of the company, was on time, and immediately prior to the accident was running at about 30 miles an hour. Mr. Fred Tucker survived the accident and was a witness for the defendants in error. Mr. Wright was killed instantly. The truck was empty and was proceeding down East Front Street at about 6 miles an hour until they came to the turn for the crossing, when the speed was slackened to 3 or 4 miles an hour. When they started to make the turn, Mr. Tucker, at a point distant about 145 feet from where the accident occurred, looked up the track in the direction from which the train was coming, but saw no train. He never looked again, although his vision was absolutely unobstructed, until he was practically on the main track and the train right on him, when it was too late to avoid the accident, the train striking the rear wheel of the truck with the result stated. Both Tucker and the deceased en-

joyed perfect eyesight and hearing, and both were familiar with the crossing.

At the close of the plaintiff's case, the defendant moved for a non-suit, which was denied, and the defendant and plaintiff in error thereupon rested, asking the Court to instruct the jury in favor of the defendant company, which was refused, and the verdict rendered as stated.

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The following is a specification of the errors relied upon, setting out separately and particularly each error asserted and intended to be urged, and where the error alleged is to the admission of evidence the specification quotes the full substance of the evidence admitted, and where the error alleged is to the charge of the court the specification sets out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused.

### SPECIFICATION OF ERRORS

#### 1.

The Court erred in overruling the objection of counsel for plaintiff in error to the introduction in evidence of Section 17 of Ordinance No. 51 of the city of Selma, specified in the Bill of Exceptions as Exception No. 3, as follows:

“Mr. Gallaher.—I have it. We desire to introduce in evidence, so that this book may not be retained here, Section 17 of Ordinance No. 51 of the city of Selma, commonly known and entitled as

the misdemeanor ordinance of the city of Selma. We offer Section 17.

Mr. Cory.—We object to that as irrelevant, incompetent and immaterial, if the Court please, not shown to have been adopted in any manner at any meeting of said city trustees, or published as required by law, or duly authenticated in any way.

Mr. Gallaher.—The statute providing for the keeping of an ordinance book in the State of California provides it shall be *prima facie* evidence as to the existence, force and effect of the ordinance as therein set forth.

The Court.—The objection is overruled.

Mr. Cory.—We except.

Mr. Gallaher.—We desire to read into evidence, so that the book may be returned, Section 17, appearing at page 197 of the (89) Book *or* Ordinances.

Mr. Kauke.—Mr. Cory, do you want the whole ordinance read? Do you desire the whole ordinance read?

Mr. Cory.—No, I don't care anything about it.

Mr. Gallaher.—(Reading): 'Section 17. Any person who shall run or propel any railroad car, locomotive, hand-car, horse car or any train of cars in this town at a greater rate of speed than eight miles per hour, or in such manner as to endanger or obstruct the free passage of any public street, is guilty of a misdemeanor.' The certificate is: 'Passed at a regular session of the board of trustees of the town of Selma held this 26th day of Decem-



ber, 1896'—giving the vote and certified by the clerk. That is all."

(See Tr. pp. 37, 38, 99 and 100, covering Exception No. 3 of the Bill of Exceptions herein and Assignment of Error No. 3).

## 2.

The Court erred in denying the motion of plaintiff in error for non-suit specified in the Bill of Exceptions as Exception No. 10, as follows:

"The defendant made a motion for nonsuit, upon the grounds that the evidence of the plaintiff showed beyond any substantial or other conflict that the accident complained of was caused solely and alone by the contributory negligence and want of care of the deceased; that it disclosed that the driver of the machine and the deceased had a clear and unobstructed view of the track upon which the train was approaching when they were a distance of 145 feet from the track on which the accident occurred, and if, during any portion of that distance, either the deceased or the driver had looked in the direction from which the train was approaching, they could have seen it and thus avoided the accident.

After argument, the motion was submitted to the Court for decision and was by the Court overruled, to which ruling the defendant then and there excepted, as set forth in said Exception No. 10 of the Bill of Exceptions."

(See Tr. pp. 70, 104 and 105, being Exception No. 10 of the Bill of Exceptions herein and Assignment of Error No. 10 herein).

## 3.

The Court erred in giving the jury the following instruction:

“Section 486 of the Civil Code of this State provides as follows: ‘A bell, of at least twenty pounds weight, must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed such street, road, or highway; or, a steam whistle must be attached and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same.’

The corporation is liable for all damages sustained by any person, and caused by its locomotives, trains, or cars, when the provisions of this section are not complied with.”

(See Tr. pp. 72, 73 and 107, being Exception No. 11 of the Bill of Exceptions herein and Assignment of Error No. 11 herein).

## 4.

The Court erred in instructing the jury as follows:

“An ordinance of the city of Selma, fixing the maximum rate of speed at which railroad trains may be operated within the corporate limits of the city, has been introduced in evidence, and, upon

the question of the alleged negligence of the defendant, you are instructed that if you find that the defendant failed to comply with such municipal ordinance at the time in question, then such failure on its part constituted presumptive negligence."

(See Tr. pp. 73 and 108, being Exception No. 11 of the Bill of Exceptions herein and Assignment of Error No. 11 herein).

5.

The Court erred in instructing the jury as follows:

"If you find that the automobile truck was operated and driven solely by the witness Tucker, and that the deceased had no control over the operation of the truck, or no right to exercise control over the same, and that he did not exercise any supervision or control over the same, then you are further instructed that in such case the negligence of Tucker (if he was negligent) is not to be imputed to the deceased so as to constitute contributory negligence on his part; but that to sustain the defense of contributory negligence, the defendant must prove or the evidence must show personal failure, on the part of the deceased to exercise ordinary care.

In other words, if you find that the deceased, Wright, was riding in the automobile truck, driven by the witness Tucker, and that he, Wright, had neither control of nor the right to control, such driver, and that he was not exercising or assuming control over the truck or such driver at the time

of the accident, then, to sustain the defense of contributory negligence on the part of the deceased, it must appear from the evidence that he, personally, as distinguished from the driver of the truck, failed to exercise ordinary care at and immediately prior to the time of the accident which caused his death. But deceased was required to exercise ordinary care in approaching said crossing."

(See Tr. pp. 75, 76, 109 and 110, being Exception No. 11 of the Bill of Exceptions herein and Assignment of Error No. 11 herein).

6.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 13 of the Bill of Exceptions herein, as follows:

"You are further instructed that the direct and approximate cause of the accident in which George Reuben Wright was killed was the contributory negligence and want of care of the deceased and the driver of the truck, and your verdict therefore will be in favor of the defendant."

(See Tr. p. 79, being Exception No. 13 of the Bill of Exceptions herein, and p. 114, being Assignment of Error No. 13 herein).

7.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 14 of the Bill of Exceptions herein, as follows:



“If you find from the evidence in this case that either the deceased, George Reuben Wright, or the driver of the truck, could have seen the train approaching the crossing at which the accident occurred before they attempted to cross the track upon which the train was approaching, and if the accident occurred as the result of their attempting to cross in front of the approaching train while it was in plain view, then the plaintiffs are not entitled to recover against the defendant and your verdict will be in its favor.”

(See Tr. pp. 79, 80 and 114, being Exception No. 14 of the Bill of Exceptions herein and Assignment of Error No. 14 herein).

8.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 15 of the Bill of Exceptions herein, as follows:

“You are further instructed that if you believe from the evidence that the direct and proximate cause of the accident was the attempt on the part of George Reuben Wright, deceased, and the driver of the truck, to cross the track in front of the approaching train, or if they had listened they could have heard it in time to have stopped their truck and prevented the accident, then you are instructed that the accident was occasioned by the negligence and want of care of George Reuben Wright and the driver of the truck and that the defendant was

not liable, and your verdict accordingly will be in favor of the defendant.”

(See Tr. pp. 80, 81, 114 and 115, being Exception No. 15 of the Bill of Exceptions herein and Assignment of Error No. 15 herein).

9.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error herein, as set forth in Exception No. 25 of the Bill of Exceptions as follows:

“You are further instructed that if you believe from the evidence that the approaching train was in plain view of either the deceased or the driver of the truck before they reached the track upon which the accident occurred, and that if either of them had looked he could have seen it before they crossed the track, or if either of them had listened he could have heard the train approaching before they crossed the track, and that if either of them had looked and listened before attempting to cross the track, he could have seen and heard the approaching train and thus avoided any danger, and that while the train was so approaching in plain view of the deceased and the driver of the truck, they attempted to cross the track in front of the approaching train, and that by reason only of any such attempt the accident occurred resulting in the death of George Reuben Wright, then I instruct you that such conduct on the part of de-

ceased and the driver of the truck was negligence and the plaintiffs cannot recover.”

(See Tr. pp. 86, 87 and 120, being Exception No. 25 of the Bill of Exceptions herein and Assignment of Error No. 25 herein).

## 10.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 27 of the Bill of Exceptions herein, as follows:

“You are further instructed that if you believe from the evidence that the employees of the defendant company failed to give the warning of the approach of the train either by blowing the whistle or ringing the bell, yet, if you further believe that under the instructions herein given you that either the deceased, or the driver of the truck, if he had looked could have seen, or if he had listened could have heard the approaching train in time to have avoided the accident by the exercise of reasonable care, then the plaintiffs are not entitled to recover.”

(See Tr. pp. 88 and 89, 121 and 122, being Exception No. 27 of the Bill of Exceptions herein, and Assignment of Error No. 27 herein).

## 11.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 30 of the Bill of Exceptions herein, as follows:

“You are further instructed that neither Mr. Wright nor Mr. Tucker had the right to depend upon the custom, or even the duty enjoined by law, of the engineer or fireman to give the customary signals of the approach of the train, as it was their duty, in approaching the crossing, to look and listen, irrespective of such signals. If, therefore, they could have seen or heard the approaching train if they had looked or listened in time to avoid the accident, then your verdict should be in favor of the defendant, even if you further believe that no warning whatever was given of the approaching train by the employees of the company.”

(See Tr. pp. 91 and 124, being Exception No. 30 of the Bill of Exceptions herein and Assignment of Error No. 30 herein).

## 12.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 31 of the Bill of Exceptions herein, as follows:

“You are further instructed that if you believe from the evidence that the train was approaching the crossing at an excessive rate of speed and in violation of the ordinance, yet, that fact is immaterial if you further believe that if Mr. Wright or Mr. Tucker had looked towards the approaching train, they could have seen it at any time sufficient to have prevented the accident, then the responsibility of the accident lies with Mr. Tucker and Mr.



Wright, and your verdict must be in favor of the defendant.”

(See Tr. pp. 91, 92, 124 and 125, being Exception No. 31 of the Bill of Exceptions and Assignment of Error No. 31 herein).

## 13.

The Court erred in refusing to charge the jury as requested by the plaintiff in error, in writing, as set forth in Exception No. 32 of the Bill of Exceptions herein, as follows:

“You are further instructed that if you believe from the evidence that the employees of the defendant were negligent, that the train was going at an excessive rate of speed, that the whistle of the engine never blew nor the bell rang, and that no warning of any kind was given to Mr. Tucker or Mr. Wright by the engineer or fireman of the train, yet, if you believe from the evidence that Mr. Wright or Mr. Tucker could have seen or heard the approaching train in time to have avoided the accident, if they had looked or listened, then your verdict must be in favor of the defendant.”

(See Tr. pp. 92, 93 and 125, being Exception No. 32 of the Bill of Exceptions and Assignment of Error No. 32 herein).

## 14.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 33 of the Bill of Exceptions herein, as follows:

“You are further instructed that it was Mr. Wright’s duty, in approaching the crossing, equally with Mr. Tucker’s, to have looked and listened for the approaching train. If, therefore, you believe from the evidence, that if Mr. Wright had looked or listened at any time before the truck actually reached the track upon which the accident occurred, he could have seen or heard the train in time to have avoided the accident, then your verdict must be in favor of the defendant.”

(See Tr. pp. 93, 125 and 126, being Exception No. 33 of the Bill of Exceptions herein and Assignment of Error No. 33 herein).

## 15.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 34 of the Bill of Exceptions herein, as follows:

“You are further instructed that Mr. Wright at the time of the accident was in charge and control of the truck, and therefore the negligence of Mr. Tucker at the time of the accident, if you find that he was negligent, is to be imputed and regarded as the negligence of Mr. Wright. If, therefore, you find under these instructions that Mr. Wright or Mr. Tucker were negligent at the time of the accident, then your verdict must be in favor of the defendant.”

(See Tr. pp. 93, 94 and 126, being Exception No. 34 of the Bill of Exceptions herein and Assignment of Error No. 34 herein).

## 16.

The Court erred in refusing to charge the jury as requested in writing by the plaintiff in error, as set forth in Exception No. 35 of the Bill of Exceptions herein:

“You are further instructed that the evidence in this case is not sufficient to justify a verdict in favor of the plaintiffs, and you will therefore render a verdict in favor of the defendant.”

“(See Tr. pp. 94 and 126, being Exception No. 35 of the Bill of Exceptions herein, and Assignment of Error No. 35 herein).

### **BRIEF OF THE ARGUMENT**

#### **SPECIFICATION OF ERROR NO. 1**

The Court erred in admitting in evidence Section 17 of Ordinance No. 51 of the City of Selma. The evidence conclusively shows that the violation, if there were any, of the ordinance in question neither proximately nor remotely contributed to the collision; in other words, there was no evidence which tended in any wise to show a causal connection between the collision and the alleged failure to observe the ordinance. This being so, evidence of the existence of the ordinance, and the breach of it

by the plaintiff in error, was irrelevant, and should have been rejected.

*Fresno Traction Company vs. The Atchison, Topeka & Santa Fe Ry.*, 22 Cal. App. Decisions 1119; citing *Davis v. California etc.* 105 Cal. 131 and *McKune v. Santa Clara etc.* 110 Cal. 480.

## SPECIFICATION OF ERROR NO. 2.

The Court erred in denying the motion of plaintiff in error for a non-suit, as set out in specification of error No. 2. *The evidence shows without conflict that the accident was occasioned solely and alone because of the contributory negligence and want of care of the deceased and Fred Tucker.*

That the deceased was himself responsible for the accident resulting in his death is abundantly established by the record of this case. It is axiomatic that if George W. Wright and Fred Tucker, the driver of the machine, or either of them, by looking could have seen, or by listening could have heard, the approaching train in time to avoid the accident, then, as a matter of law, the deceased must be held at fault and no recovery can be had against the company. The case lies in a small compass, and as this is the crux of the case, it is necessary to refer at some length to the testimony upon which we base our claims.

FRED TUCKER testified for the plaintiffs in substance as follows:



My age is thirty-seven. I am and was in May, 1914, in the automobile business, selling and handling automobiles, and had been in that business about four years. I am familiar with the operating of machines and trucks, and on May 22, 1914, I was one of the parties that were in the collision on the Southern Pacific railroad tracks at Selma. I was using a 3½-ton Kelly truck. It was obtained from J. C. Phelan. I had full charge of the operating of the truck. Prior to the time of the accident that morning we had hauled one load of raisins to Del Rey and on the return trip filled up with distillate at the Standard Oil filling station. Mr. Wright had been riding with me on the truck that morning up to the time of the accident. I was driving as we were coming down from the Standard Oil tanks to the place of the accident. (Tr. p. 33). Mr. Wright had nothing to do with the operating of the machine. At the point of the accident, Arrant street crosses the Southern Pacific tracks at right angles. There is a street westerly and parallel to the railroad, called West Front street, and a roadway easterly parallel to the railroad track, called East Front street. There are two side tracks between East Front street and the main line. It is about 60 feet from the main line to the railroad from the right of way on East Front street, at right angles. It is approximately 1400 feet from the Arrant-street crossing to the Standard Oil Company's tanks. The next crossing north from the Southern Pacific tracks is beyond the oil tanks (Tr. p. 34). It is three city blocks from Arrant-street crossing to the passenger depot at Selma. After leaving the oil tanks we came southeast parallel the railroad, on East Front street. At about 145 ft.

in a circle, where we started to make the turn from the tracks, I looked for the trains which might be coming from the northwest and going southeast. I would travel about 145 ft. from that point of observation to the crossing of the main line. (Tr. p. 35.) At that point I looked at the track as far as I could see in making the angle. I looked up the track and could see with a clear vision to the oil tanks or a little further. I also listened for trains. My eyesight is perfect and my hearing is good. At that time I saw the railroad tracks from the crossing to a point beyond the oil tanks. I did not see any train, none in sight. I had not heard any warning sound in the way of a bell, whistle or otherwise (Tr. p. 36). At that point, about 145 feet from the main track where the accident occurred, I looked clear up the track, that it was clear in that direction. I got a good, clear view as far as the oil station or a little further. Then as Castle Bros. packing-house on the left hid the view both on the platform and side tracks there, I directed my view that way until I got clear out beyond until I knew everything was safe the way my view was headed. I looked to the left, which would be southeasterly, towards the depot and Castle Bros. packing-house. Then after I was through looking that way, I turned and looked the other way. I then had reached the point where the truck was practically going on the main line track, when I saw the train coming. Practically the front part of the truck was on the main line. I could only see the train coming, and didn't hear any whistle or bell. It seemed to be coming very fast (tr. p. 39). It was coming from the northwest. I opened up the throttle and tried to gain a little more speed. The auto-

mobile went forward. I watched this way until the train struck. That was the last I knew. The collision was about nine o'clock in the morning. I had known Mr. Wright about two years. He seemed to be a strong man, perfectly well (tr. p. 40). With reference to observing the train, I believe Mr. Wright looked up the track the first time I did, when we first made the circle. After that I did not observe because I was looking away from him. Nothing was done by him that I saw, or said by him to me, with reference to the train coming.

The witness was then referred to a blueprint map which was introduced in evidence, the original of which is now on file with the Clerk of this Court, as part of the record of this writ of error.

The witness then testified:

This map shows Arrant street running diagonally, and it then goes at right angles across the track (tr. p. 41). The rectangular space marked "Castle Bros. packing-house", that is the packing-house I referred to, the one where I looked to the southeast to notice trains coming up from the south. That map shows that we had to cross two tracks east of the main line before we could get to the main line where the accident occurred (tr. p. 42).

On cross-examination the witness testified as follows:

The day on which the accident occurred was a bright May day and no wind blowing. There was no unusual noise to distract my attention at the time we made this crossing. We proceeded down



from the oil station on East Front street. The truck was a left-hand drive. As we proceeded down towards Selma I was driving the truck and was on the east side of the truck, in other words, the side of the truck furthest away from the railroad. Mr. Wright was seated with me on the right side. There was only one seat on the truck and he was on the side nearest the railroad. In a way I was fulfilling two things, demonstrating the truck to Mr. Wright and also doing some work for him. He was paying for the use of the truck, renting it. I was driving the truck for Mr. Phelan. I had charge of it, was the driver to go with it, and Mr. Wright was paying the rental for it. It had been used one day before that. I should judge we were going about 6 miles an hour when coming down the highway until we got to the corner. The truck was empty. I was not talking to Mr. Wright and he was not saying a word from the time we were at least half-way down from the oil station to the time of the accident. On making the turn for the crossing, I slowed down to 3 or 4 miles an hour. When I started to make the turn I looked first towards the oil tanks to see that no train was coming. I didn't see any train and from that time proceeded on my way and never looked in the same way again to see if a train was approaching until I passed a clear vision of the packing-house (tr. p. 43). I was practically in the main track when I looked and saw the train coming right on us. For the 145 ft. I testified to, during that entire time while we were traversing the 145 ft. practically, I never looked again towards the oil tanks, or northwest, to see if the train was approaching. The view was not obstructed in any



way. The only thing there was to obstruct our vision, if it can be an obstruction, were some telegraph poles. The whole space there was unobstructed and there was no reason why, if I had looked, I could not have seen the train approaching. I am sure Mr. Wright's eyesight was good. It was good as far as I know, and his hearing was good. Before we reached the main track at that crossing on that day, we crossed two other tracks on the railroad. The main track was the third track. I measured the distance as near as I could. I stepped it. I have been there several times since the accident (tr. p. 44). The first time, to determine this point, I took a truck and drove it over the ground as near as I could the same speed that I drove it that day. I have no way of exactly locating the point where I say I looked, but the best of my recollection is that it was about 145 feet. I also stepped the distance between the crossing and the oil tanks. It was 1400 feet. As I came near the main line I could see further and further up the main track, so before I reached the main track there was nothing to obstruct my vision for miles up the main track except the poles. From the point where I was when I looked, the only obstruction would be the oil tanks, except the poles (tr. p. 45). The train struck the rear wheel of the machine. The rate of speed I think that we were going from the time I looked until we got to the main track was some 3 or 4 miles an hour (tr. p. 46). I made the arrangements with Mr. Phelan over the phone. Mr. Wright was to get the truck for \$15 a day. I was to drive it. Somewhere north of the tanks was the city limits. The maximum speed of the truck when empty is 12 miles an hour.

It would not make 12 miles an hour loaded (tr. p. 47).

OSCAR THURMAN HESS, a witness for the defendants in error, testified in substance as follows:

I saw the accident in which Mr. George R. Wright was killed. At the time of the accident I was a letter carrier at Selma and was almost due south from where the accident occurred. That was about 200 ft. from the main track where this collision occurred. The accident was between 8:45 and 8:50 that morning (tr. p. 48). I saw the train coming. When I took particular notice it was between the oil tanks and the crossing, pretty well towards the oil tanks. When I noticed the train there was no whistle. I cannot swear positively whether the bell was ringing. I did not hear any bell when the train stopped. Before the collision I noticed the truck coming down the road on the east side of the track. I never noticed any blowing of the whistle during all that time. I saw the truck when it made the turn in the road to get to the railroad. I don't know just where the engine was then. At that time I was paying attention to both, because when that truck made the turn there they were getting close enough to be within danger if one or the other did not stop. I think the engine was below the oil tanks, between the tanks and the crossing. I noticed the train was not making much noise. It was going at the rate of 30 miles an hour (tr. p. 50). The truck was 100 ft. from the main track as near as I can estimate, at the time I saw the engine this side of the oil tanks. The engine struck the hind wheel (tr. p. 51). There

were seven coaches to the train and it came to a standstill where the last coach stayed on the crossing and blocked it. I didn't hear anything in the way of any grinding noise or brakes. At the time I saw the train and also the truck some hundred feet distant from the main track, I could hear the roaring or rumbling of the train, and could also hear the truck. I have no knowledge of hearing any bell or whistle.

On cross-examination this witness testified as follows:

I saw there was probably going to be an accident and was very much interested. I was watching the movements of both very closely (tr. p. 52). I knew the truck and knew that Mr. Tucker was demonstrating that truck in Selma. I watched the men in the truck. The only movement I could say positively that the men made was to raise just as the accident happened, both of them. I cannot say that I saw them make any movement at all until just before they got on the track. I was watching generally the movements. Just as it struck they both stood up. The train was coming down on the right-hand side of these men, and Mr. Wright would be nearer the train (tr. p. 53). When they were 100 ft. from the crossing I saw the train south of the oil tanks. There was nothing to obstruct the view of either Mr. Wright or Mr. Tucker of the approaching train. I think the train must have been at least 300 yards when I first saw it, as the truck began to turn into the crossing. When I first realized there was going to be an accident the train was a couple of hundred yards away. The truck was then about 100 ft. away, and the



train went two hundred yards. I knew from the fact that the main track is not far from the side track and there are two spurs on that side of the main line, and they were still coming on and as I could not notice any slackening of their speed, I thought "My goodness, are they going to come on?" I expected them to stop at any time. At this time the train was in plain view and had been in plain view ever since they had passed the oil tanks if they had wanted to look. The view is plain to the oil tanks. It was after they started to make the turn that I thought there was going to be an accident (tr. p. 54). At this point there is no grade to speak of, the tracks are practically level from the oil tanks, and the grade crossing is level with the tracks, and the tracks level with the road. It was a nice, pleasant May morning. I heard the train coming from the time I first saw it. I am familiar with the time that train reaches Selma. My business calls me to that neighborhood every morning, about the time that train comes along, and if I was on schedule time, I generally passed along there in that block when the train passed along, for six months. The train was practically on time that morning and came in just as it usually came in.

On re-direct examination this witness testified:

When I first thought there was danger of a collision the truck had almost completed the turn, but was not facing directly across the track at that time. The truck had not started to make the turn to the right when I noticed it. That turn to the right is about 125 to 130 ft. from where the collision occurred (tr. p. 56). From where it started to make the turn they had 125 ft. to travel to reach



the center of the track. In order to get into Selma they did not have to make this crossing. They could have gone on down East Front street. There were several ways they could have taken in order to get to Selma (tr. p. 57).

JOHN BRIDGES, a witness for the defendants in error, testified in substance as follows:

I reside a little south of the Standard Oil tanks on the west side of the railroad (tr. p. 57). I was at home at the time of the accident and had a full view of the railroad, both up and down. The accident occurred about 9 o'clock. I was almost half-way between where the accident happened and the oil station, on the west side. When I first saw the train it was up by the oil station, close to the city limits crossing. I saw it from there down to the place of the accident. I didn't hear the bell ringing. The whistle blew at the city limits, at the crossing. I didn't hear the whistle blow any more. I should judge the speed of the train was about 30 miles an hour. The truck was on the opposite side of the track, going the same way as the train. When it hit the truck there was quite a racket (tr. p. 58). The last car of the train was just a little below the crossing when it stopped. I heard no bell, whistle or alarm after it left the first crossing.

On cross-examination he testified:

It seems to me that train had been coming along through Selma at about that time of day, and that speed, for a year or more (tr. p. 59). There was no whistle or alarm, I didn't hear it. I was not out

there paying attention to whether the whistle blew or the bell rang. When the train is on time it is generally running about 30 miles an hour (tr. p. 60).

FLORENCE BOLES testified for the defendants in error in substance as follows:

I know the place where the collision occurred. I was about two blocks from the place of the accident, west of it. When I heard the crash I looked out, but could see nothing but dust (tr. p. 61). I had noticed the train coming in. I heard the rumble of the train, but did not notice any bell or whistle. The train had been running on that schedule for some little time and its passing was what called my attention to the time of day (tr. p. 62).

WADE CARGILE testified for the defendants in error as follows:

At the time of the accident I was near the depot. I was in the draying business, working for the deceased (tr. p. 63). The deceased was about thirty-seven years of age. He was in the draying business. I conducted the business for the widow for a time (tr. p. 64). The deceased's net earnings were something near \$150 per month. The business varied. He was a very robust man and industrious, and was kind to his family, and his domestic relations were happy (tr. p. 65).

MRS. GERTRUDE WRIGHT, testifying, said:

I am the wife of George R. Wright. He was thirty-seven years of age. We were married in 1901. We had two children, both living, Orene and

Ora. My husband was in the truck business at the time of his death. He was paying for the business in installments. I was in the millinery business. He made about \$175 per month (tr. p. 67). Our home life was happy. He owed \$500 on the business when he was killed. He had agreed to pay \$1500, and had paid all of that but \$500. He purchased the business originally four years before his death. He had paid \$1000 on it (tr. p. 69).

There was then introduced in evidence the American table of mortality, from which it appeared that the expectancy of life of Mr. Wright was 30.35 years; that of Mrs. Wright 35.33 years; and that of the children was respectively 47.45 years and 48.72 years.

There was also introduced in evidence the book of ordinances of the City of Selma, providing that any person who shall run or propel any railroad car, locomotive or any train of cars in the town of Selma at a greater rate of speed than eight miles an hour, is guilty of a misdemeanor. This ordinance was adopted on December 26, 1896 (tr. p. 37-38).

The appointment of Gertrude Wright as guardian *ad litem* was admitted (tr. p. 70).

The defendants in error then rested, whereupon the plaintiff in error made a motion for a non-suit upon the following grounds, to-wit: That the evidence of the plaintiff showed beyond any substantial or other conflict that the accident complained of was caused solely and alone by the contributory

negligence and want of care of the deceased; that it disclosed that the driver of the machine and the deceased had a clear and unobstructed view of the track upon which the train was approaching when they were a distance of 145 feet from the track on which the accident occurred, and if, during any portion of that distance, either the deceased or the driver had looked in the direction from which the train was approaching, they could have seen it and thus avoided the accident. This motion was denied, to which ruling the plaintiff in error then and there excepted (tr. p. 70). The plaintiff in error thereupon rested.

The map referred to was introduced in evidence, and certain instructions were given to the jury (tr. p. 71).

Among other things, the Court instructed the jury that if they believed from the evidence that on approaching the crossing at the time of the accident, no bell was rung or whistle sounded, or other warning signal given by the defendant company, that this constituted presumptive negligence.

Also, that if they found that the defendant company failed to comply with the ordinance mentioned, that such failure also constituted presumptive negligence (tr. p. 73).

Also, that there was no evidence before the jury that either the fireman or engineer had any actual knowledge or notice that either Mr. Tucker or Mr. Wright were crossing or attempting to cross the railroad track in front of the approaching train



and that no inference of negligence on the part of the defendant could be drawn because of the fact that the fireman and engineer might have known of the danger in which Mr. Tucker and Mr. Wright were placed, and that the last chance doctrine, so-called, had no application to the facts of this case.

Also, that if the negligence on the part of the deceased contributed in any manner directly or proximately to his death, there can be no recovery.

Also, that it is well settled that the railroad track of a steam railway must of itself be regarded as a sign of danger, and one intending to cross must avail himself of every opportunity to look and listen for approaching trains, and that if he sees an approaching train upon the track, or could have seen the same if he had looked, he must not place himself in a dangerous position by attempting to cross in front of it, and if, when the approaching train is in plain view, he attempts to cross in front thereof and an accident happens by which he is injured, he is guilty of contributory negligence (tr. p. 74).

Also, that to sustain the defense of contributory negligence on the part of the deceased, it must appear from the evidence that he personally, as distinguished from the driver of the truck, failed to exercise ordinary care at and immediately prior to the time of the accident which caused his death, and deceased was required to exercise ordinary care in approaching said crossing. (tr. p. 75-76).

The foregoing is the sum and substance of the testimony in this case with reference to the negligence and want of care of the plaintiff in error and the contributory negligence, if any, of the deceased. It was upon this testimony that the jury rendered a verdict against the defendant company in the sum of \$12,000. We submit that no fair-minded person can read this testimony without being at once convinced that the responsibility for this accident must rest with the deceased and the driver of the truck. It is an admitted fact in the case that the train was in plain view of the deceased and Mr. Tucker while the truck was traversing 145 feet at the speed of 3 to 4 miles an hour; that if either the deceased or Mr. Tucker had looked at any time while passing over this distance, the approaching train could have been seen in ample time to have avoided the accident. In fact, Mr. Tucker concedes that the only reason he did not see the approaching train was because of his failure to look; that the deceased was on the side nearer the track, with equal, or even better opportunities for looking and listening than Mr. Tucker himself, and that the only reason the accident occurred was because they did not look up the track in the direction from which the train was approaching during the entire time taken in traversing the 145 feet mentioned. It is too plain for argument that neither the deceased nor Mr. Tucker looked or listened. If they, or either of them, had done either, the accident would not have occurred and Mr. Wright's life

would have been saved, as there was ample and abundant time to have stopped the truck before attempting to actually cross the track in front of the approaching train. Indeed, it would seem from the evidence that both Mr. Tucker and the deceased heedlessly, thoughtlessly, and without the slightest regard for their safety, continued their journey across the tracks and only awakened to a realization of their peril when it was then too late to avoid the accident. The only conclusion that can be drawn from this record is that the deceased and Mr. Tucker, in approaching the track in question, while passing over this distance of 145 feet were each entirely oblivious to the fact that a train might be approaching from the northwest. If the judgment, in the face of this evidence, can be sustained, we can hardly conceive of a case where the plea of contributory negligence would avail. It is a conceded and controlling factor in this case that the accident occurred solely because of their failure to look for the approaching train. Such is Mr. Tucker's statement, and all of the evidence corroborates it.

As we have seen, the jury were instructed, as the law of the case, that the deceased, as well as Tucker, was required to use ordinary care in approaching the crossing; that the last-chance doctrine did not apply, and that it was lack of ordinary care for one intending to cross a railroad track not to avail himself of every opportunity to look and listen for approaching trains and that if he could

have seen the approaching train, if he had looked, he should not have attempted to cross in front of it, and if, when the approaching train is in full view, he attempts to cross in front thereof, and an accident happens, he is guilty of contributory negligence.

These instructions, under the facts of the case, would seem to require a verdict in favor of the plaintiff in error. They were told, as a matter of law, that if a person attempts to cross in front of an approaching train which is in plain view, and he is injured, that in itself is a lack of ordinary care, and that the deceased, irrespective of Tucker's care and caution, was himself required to use ordinary care. In other words, that it was incumbent upon the deceased, as well as Tucker, not to attempt to cross the track in front of an approaching train which was in plain view. It being conceded in the evidence that they did make an attempt while the train was in plain view, resulting in the accident, it would seem inevitably to follow that the verdict of the jury should have been in favor of the defendant company, and that the Court should have granted the motion for a non-suit.

The law relating to this question, both in the Federal and State courts, is entirely plain and well settled and in accord with the instructions given the jury.

A leading case and one quite analogous to the case at bar is that of *Brommer v. Penn. R. Co.*, 179 Fed. 577. The decision is by the Circuit Court of



Appeals, Third Circuit, and relates to a highway crossing accident at Camden, N. J. The opinion deals with three cases tried together and so presented in the appellate court.

One Brommer was driving his automobile over a grade crossing when it collided with a train. In the automobile were Mr. and Mrs. Henderson and Mrs. Blockson, all of whom Brommer had invited to ride with him. Mrs. Henderson was killed and the other three occupants injured. These three brought suits and in the trial court below Brommer was held guilty of contributory negligence and a verdict rendered against him, but verdicts were recovered by Henderson and Mrs. Blockson.

It appeared from the facts that Brommer had no previous knowledge of the approaches to the crossing. He came in sight of the crossing about 170 feet therefrom. The track, however, was shut out by hedges and houses on either side of the avenue from his sight. That the train causing the accident could not be seen coming until he got within 40 feet of the track, when it could be seen 500 or 600 feet from the crossing. Actual measurements showed that at a point 30 feet back from the track there was a clear view down the track for 1400 feet.

In considering the duty of the driver of the automobile under such circumstances, the Court, through Judge Buffington, says quoting from the case of *New York Central Co. v. Maidment*, 168 Fed. 23, 93 C. C. A. 415 (21 L. R. A. (N. S.) 794:

“With the coming into use of the automobile, new questions as to reciprocal rights and duties of the public and that vehicle have and will continue to arise. At no place are those relations more important than at the grade crossings of railroads. The main consideration hitherto with reference to such crossing has been the danger to those crossing. A ponderous, swiftly moving locomotive, followed by a heavy train, is subject to slight danger by a crossing foot passenger, or a span of horses and a vehicle; but, when the passing vehicle is a ponderous steel structure, it threatens, not only the safety of its own occupants, but also those on the colliding train. And when to the perfect control of such a machine is added the factor of high speed, the temptation to dash over a track at terrific speed, makes the automobile unless carefully controlled, a new and grave element of crossing danger. On the other hand, when properly controlled, this powerful machine possesses capabilities contributing to safety. When a driver of horses attempts to make a crossing and is suddenly confronted by a train, difficulties face him to which the automobile is not subject. He cannot drive close to the track or stop there, without risk of his horses frightening, shying, or overturning his vehicle. He cannot well leave his horse standing, and if he goes forward to the track to get an unobstructed view and look for coming trains he might have to lead his horse or team with him. These precautions the automobile driver can take, carefully and deliberately and without the nervousness communicated by a frightened horse. It will thus be seen an automobile driver has the opportunity, if the situation is one of uncertainty, to settle that uncertainty on the side

of safety, with less inconvenience, no danger, and more surely than the driver of a horse. Such being the case, the law, both from the standpoint of his own safety and the menace his machine is to the safety of others, should in meeting these new conditions, rigidly hold the automobile driver to such reasonable care and precaution as go to his own safety and that of the traveling public. If the law demands such care, and those crossing make such care, and not chance, their protection, the possibilities of automobile crossings accidents will be minimized."

The Court, continuing, says:

"Now, the plaintiff, by his own showing, had a vantage point 30 or 40 feet from the track where he could have stopped and seen a train at least 500 feet away. And it is equally clear that, if he had stopped and looked, this accident would not have happened. In the *Maidment Case*, *supra*, we said:

'The duty of an automobile driver approaching tracks, where there is restricted vision, to stop, look, and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty.'

This rule is conducive to safety, and observation and experience have deepened our conviction of its soundness. We therefore adhere to it and now restate it, and the court below was clearly right in holding it was conclusive of this case. Here, as there, the driver of the machine, when stopping, looking, and listening, would have prevented the



accident, made chance, not stopping, the guaranty of his safety." \* \* \*

'If a traveler,' says Wharton's *Law of Negligence*, quoted with approval in *Pennsylvania v. Righter*, 42 N. J. Law, 186, 'by looking along the road, could have seen an approaching train in time to escape, it will be inferred, in case of collision, that he did not look, or, looking, did not heed what he saw.' To the same effect are authorities cited in Elliott on *Railroads*, Sec. 1165.

The question of Henderson's negligence was then taken up by the Court, it being held that Brommer being culpably negligent, was Henderson any the less so; which is precisely the question presented here; and in that connection the court says:

"It is true there are cases, but this is not one of them, where a person hires a supposedly capable driver, and being regarded by the law as a passenger for hire, and as having no part in the management or control of the vehicle, is visited with no duty to help selfguard it. But this is a different case. Henderson was not a passenger, and Brommer was not a quasi carrier; but the whole party were united for a common purpose and had a common object in view. Brommer had no greater duty or obligation toward the others than they toward him. It is true he was running the machine; but if anything threatening the general safety of the party came within the knowledge of any of them, and he or she by timely warning was able to warn Brommer of such danger, and as a direct and proximate result of not doing so he or she suffered damage, how can it be said this was not negligence, and that thereby he



or she did not contribute to causing the accident? The cases in each of the states in this circuit would hold such conduct negligent." \* \* \*

"Now, as we have before noted in Brommer's case, the proof is that Brommer was approaching the crossing at a two-mile gait (slower than a slow walk); that he was slowing up; that the machine was under control; that there was a place 30 or 40 feet back from the track where it could be seen for 500 or 600 feet. It is therefore clear that Henderson could safely have called on Brommer to stop, and that if he chose to allow him to make a running crossing, without knowledge of what he might encounter, he in fact joined him in testing the danger. \* \* \*

But in our view the question before us is not whether Brommer's negligence is to be imputed to other occupants of the car, but whether they or any of them omitted that due care—and negligence is lack of due care—which under the circumstances they were bound to take. And to our view the court, in making the test of contributory negligence that 'plaintiffs must have in some measure actively participated by word or deed therein, so as in a sense to make his act their own', erred, for in *Little v. Hackett*, 116 U. S. 371, 6 Sup. Ct. 391, 29 L. Ed. 652, the Supreme Court held that acts of omission, as well as commission might constitute contributory negligence, saying:

"That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters not whether that contribution consists of his participation in the direct cause of the injury, or in his omission of

duties which, if performed, would have prevented it. If his fault, whether omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong.'

It follows, therefore, that Henderson was under obligations to take due care of his own safety. He was not a passenger for hire. He was engaged in the common purpose of a pleasure ride with the driver of the machine. He knew they were approaching a railroad crossing. Being free from the engrossing work of operating the machine, and occupying a seat beside the driver, he was in an even better situation than Brommer to look out for the safety of the machine. His own safety and the instinct of self-preservation should have led him to do so. \* \* \*

Measured by this standard, and the rule is founded on sound reason and is conducive to safety, we see no escape from the conclusion that Henderson was equally culpable with Brommer. He knew they were approaching a railroad crossing. As he approached he saw the view was shut off from the track. Thus ignorant of the safety or danger of the crossing, prudence, self-preservation, and the positive demand of the law called upon him to stop before attempting the passage. The machine was under control, by his own account, only going at a two-mile rate. Under the circumstances he was called to act, or, if he chose to keep silence and join in chancing the crossing, the law will not hold him faultless of his share of bringing about the accident."

The verdict in favor of Henderson was therefore reversed.

In the case of *New York Central, etc. v. Maidment*, 168 Fed. 21, it is said:

“Because of the fact that a collision between a railroad train and an automobile endangers, not only those in the automobile, but also those on board the train, and also because the car is more readily controlled than a horse vehicle, and can be left by the driver, if necessary, the law exacts from him a strict performance of the duty to stop, look, and listen before driving upon a railroad crossing, where the view is obstructed, and to do so at a time and place where stopping and looking and listening will be effective.

An automobile driven by plaintiff, in which he was riding with a friend, was struck by a train at a railroad crossing, and he was injured. There were double tracks, and plaintiff stopped 20 feet from the nearest track to allow a train on such track to pass, and then started ahead and was struck by a train on the other track going in the opposite direction. From the place where he stopped the tracks could be seen for a considerable distance in the direction from which the first train came; but owing to trees and other obstructions, he could not see more than 175 feet in the other direction. If he had stopped on the first track, he could have seen the approaching train when 700 feet away; but he did not stop. *Held*, that he took chances rather than precaution, and was chargeable with contributory negligence, which precluded a recovery for his injury from the railroad company.”

In the case of *Northern Pac. Ry Co. v. Tripp*, 220 Fed. 286, it appears from the record that the accident occurred about 10 o'clock in the forenoon



of a bright July day. That the plaintiff was in the livery and had used automobiles for several years and owned and was operating the one in which he was at the time the accident occurred. That there was sufficient evidence of the defendant's negligence as to the speed of the train and the failure to give proper warning by a bell or whistle, but it was contended there, as here, that the undisputed evidence showed plaintiff's contributory negligence in not taking proper care; that after his view was unobstructed by two box cars, he had a distance to go before reaching the nearer rail of the main track of 43 feet, and from any point along this distance of 43 feet his view of the main track was unobstructed and he could see the approaching train for 800 feet. However, he did not look in this direction after passing the obstruction of the box car. His automobile was traveling about 5 miles per hour and he was looking to the west, where his view was obstructed, until he had gone 30 or 40 feet. If the plaintiff were traveling at 5 miles per hour, and had a distance to go of 116 feet before he reached the main track, a train running at 35 miles an hour would cover the 800 feet that is admitted to have been the limit of his vision down the main track, and be upon the crossing at the same time he would reach it. The Court considering this question says:

“For the distance of 43 feet in which he had a clear view to the east after passing that car, he



was master of his movements, with an ample factor of safety. If the speed at which he was driving was such that he had not enough time to look in both directions along the railway track, reasonable care required that he should control that speed until his safety could be assured. If one traveling in an automobile at 5 miles per hour may continue toward a railway track for a distance of 43 feet after passing an obstruction without looking in each direction, then one traveling in such a vehicle at 25 miles per hour need not look out for a distance of 235 feet, and a pedestrian walking at the not unusual rate of 3 miles per hour would be authorized to travel 25 feet while having opportunity for a clear view and neglecting it. \* \* \*

In the case of *Chicago Great Western Ry. Co. v. Smith*, 141 Fed. 930, 73 C. C. A. 164, the person injured was walking across railway tracks, and after passing a 'dead engine' on one track had but 7 feet to go to the next track; but a failure to look while going that distance was held fatal to recovery by this court. It was said:

'These facts permit of no other conclusion than that the deceased went upon the coal track without taking the precautions necessary to determine whether he could do so in safety. This was negligence. The place was one of great danger, and the track was itself a warning. As was said in *Elliott v. Chicago etc. Ry. Co.*, 150 U. S. 245, 248, 14 Sup. Ct. 85, 86, 37 L. Ed. 1068: "It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom." The law requires of one going into so dangerous a place the vigilant exercise of his faculties of sight and hearing at such short distance therefrom as will be

effectual for his protection, and if this duty is neglected, and injury results, there can be no recovery, although the injury would not have occurred, but for the negligence of others.'

In the case of *Horan v. Boston & M. R. R.*, 183 Fed. 559, 106 C. C. A. 535, one walking 15 feet to a railway track after having looked and listened and without looking again was held guilty of contributory negligence. A similar rule was applied to the driver of vehicles in the case of *Pyle v. Clark*, 79 Fed. 744, 25 C. C. A. 190, where the driver of a team stopped 15 to 25 feet from the railway track and looked in both directions before driving forward. This court said:

'Pyle was the driver of the team, and he was responsible for its movements. He was sitting on the north side of the wagon, on the side from which the train that collided with his wagon approached. His view of the track on which it came was unobstructed for 2,000 feet. His horses were not afraid of the cars, and they were standing still from 15 to 25 feet from the track. He sat quietly in his wagon for a minute after he looked to the north, and then, without looking north again, he drove slowly upon the track, and the engine coming from that direction caught him. His failure to use his eyes diligently, his failure to look to the north for an entire minute before he drove upon the track, and his act of starting his horses forward upon it, without glancing alternately in each direction, were acts of gross negligence. If he had not been guilty of them, the accident could not have happened. If he had not driven his horses upon the track in front of the approaching engine, there would have been no collision; and if he had looked to the north

immediately before he drove them forward, he would never have done so. Upon this state of facts, there was no escape from the conclusion that the negligence of Pyle was the proximate cause of the collision.'

See, also, *Chicago M. & St. P. Ry. Co. v. Bennett*, 181 Fed. 799, 104 C. C. A. 309; and note in 37 L. R. A. (N. S.) 139. \* \* \*

In the present case the evidence is undisputed that the plaintiff was advised that his vision was limited at the time he looked to the east. He knew that it would grow more so until he approached the crossing over the house track, where it would be entirely cut off by the box car to the east. After he passed this obstruction he looked constantly to the west, where obstructions prevented effective vision, and he was aware that he had not looked again to the east, and so continued, until he reached the final danger point. The obstruction to the west, instead of being an excuse, was a warning, not only that he was in danger from that direction, but also from the opposite direction, because of his lack of attention there. Under such circumstances, his duty was plain. He should have taken time in which to glance in the opposite direction, where the slightest glance would have shown his danger, or he should have exercised his control over his vehicle, so that he could listen for approaching trains, or have stopped it, if necessary, until he could use his senses of sight and hearing, and the failure to do so was negligence on his part. *Chicago & N. W. Ry. Co. v. Andrew*, 130 Fed. 65, 64 C. C. A. 399; *Chicago, R. I. & P. Ry. Co. v. Pounds*, 82 Fed. 217, 27 C. C. A. 112; *Grimsley v. Northern Pac. Ry. Co.*, 187 Fed. 587, 109 C. C. A. 417; *Chicago, M. &*



*St. P. Ry. Co. v. Bennett*, 181 Fed. 799, 104 C. C. A. 309; *Chicago, B. & Q. R. Co. v. Munger*, 168 Fed. 690, 94 C. C. A. 176; *Davis v. Chicago R. I. & P. Ry. Co.*, 159 Fed. 10, 88 C. C. A. 488, 16 L. R. A. 424.

The motion for a directed verdict should have been sustained, on the ground that the evidence showed contributory negligence on the part of the plaintiff, and the judgment must accordingly be reversed, and a new trial granted."

In the case of *Rebillard v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 216 Fed. 503, decided by the Circuit Court of Appeals for the 8th Circuit, in an action for damages arising in North Dakota, it appeared that the plaintiff was riding with others, as a guest, in an automobile at night. The lights gave out and they stopped at a town but could procure no light, except an oil lamp which was very dim. After traveling several miles, the machine went over the embankment into a cut made by the defendant railroad company and plaintiff was injured. It was claimed that, as the plaintiff was merely a guest of the owner and driver of the car and exercised no control over him, the driver's negligence was not contributory to him. Upon this question it is said on page 506;

"In *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652, which is the leading American case on this subject, and which has been followed by the American courts generally, the rule was established that the contributory negligence of the driver of a public conveyance would not be imputed



to a passenger. And this court in *Union Pacific Ry. Co. v. Lapsley*, 51 Fed. 174, 2 C. C. A. 149, 16 L. R. A. 800, and *City of Winona v. Botzet*, 169 Fed. 321, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204, has extended this rule to a person who accepts a gratuitous invitation of the owner and driver of a vehicle to ride with him, even if it is not a public conveyance. But an examination of the many cases on that question shows that the writers of the opinions are careful to except a passenger or guest who with knowledge of the danger remains in such dangerous position. *Dyer v. Erie Ry. Co.* 71 N. Y. 228; *Brickell v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 290, 294; 24 N. E. 449; 17 Am. St. Rep. 648; *Transfer Co. v. Kelley*, 36 Ohio 86, 91; 38 Am. St. Rep. 558; *Wabash etc. Ry. Co. v. Shackel*, 105 Ill. 364, 44 Am. Rep. 791; *Davis v. C. R. I. & P. Ry. Co.*, 159 Fed. 10, 19; 88 C. C. A. 488, 497, 16 L. R. A. (N. S.) 424; *Brommer v. Pennsylvania Ry. Co.*, 179 Fed. 577, 581, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924; *Dean v. Pennsylvania R. R. Co.*, 129 Pa. 524, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733.

In *Davis v. C. R. I. & P. Ry. Co.*, *supra*, this court quoted with approval the following extract from *Brickell v. N. Y. C. & H. R. R. Co.*, *supra*:

'The rule that the driver's negligence may not be imputed to the plaintiff should have no application to this case. Such rule is only applicable to cases where the relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver by an enclosure, and is without opportunity to discover danger and to inform the driver of it. It is no less the duty of the passenger, where he has the

opportunity to do so, than of the driver to learn of danger, and avoid it if practicable.'

The same rule is laid down in *Schultz v. Old Colony Street Ry. Co.*, 193 Mass. 323, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402; *Partridge v. Boston & M. Ry. Co.*, 184 Fed. 219, 107 C. C. A. 49.

The plaintiff, as a reasonably prudent person, must have known of the danger incident to riding in a motor car on a dark night, without lights, over roads with which neither the driver of the car, nor any of the persons with him in the car, were familiar. When with the full knowledge of that fact the plaintiff remained in the car he was as guilty of negligence as the driver himself. As stated by Judge Phillips in the *Davis* case:

'The law of common sense applied to such a situation is that the movement and control of the vehicle is as much under the direction and control of the one as of the other.'

The action of the court in directing a verdict in favor of the defendant was right, and the judgment is accordingly affirmed."

In the case of *Erie R. Co. v. Hurlburt*, 221 Fed. 907, the decision being rendered by the Circuit Court of Appeals for the Sixth Circuit on April 6, 1915, it appears that the accident happened in the State of Ohio; that at the close of the plaintiff's evidence, a motion was made by company for a directed verdict, which was overruled, but it was held that the company waived the exception to the ruling made by the Court by thereafter introducing evidence in its own behalf, which differentiates it

from the case at bar. It was further contended that the Court erred in refusing to instruct the jury to return a verdict for the company on all the evidence, which contention was sustained by the Appellate Court and the case reversed.

It appeared from the evidence that there was only one surviving witness to the accident and that her testimony touching the question of contributory negligence was wholly undisputed. That the buggy containing Mrs. Hurlburt and her husband was struck by one of the company's engines at a highway crossing, killing her husband and seriously injuring Mrs. Hurlburt. The accident occurred at 9 o'clock in the morning. The weather was clear and cold. They were traveling along the highway with the curtains of the buggy down, and they were well wrapped up. East from the point of crossing the track could be seen for nearly 1500 feet. The train was on the track farthest from the travelers. They stopped when they reached a point about 15 feet from the nearest rail of the track next to them, and both of them looked East along the track and listened for the train. They neither saw nor heard it. Thereupon, the husband, who was driving and sitting on the right side of the buggy, started the horse, which began to trot. The husband made no further effort to ascertain if it were safe to cross, but Mrs. Hurlburt said that through an opening in the curtains, she watched the track from the east from the time the horse started until the collision,



but that she saw no train because the train was not there.

Upon this state of facts the Appellate Court said, quoting from the opinion of Mr. Justice White (now Chief Justice), in speaking for the Supreme Court, in *Southern Pacific Co. v. Pool*, 160 U. S. 440, 16 Sup. Ct. 339, 40 L. Ed. 485:

“There can be no doubt where evidence is conflicting that it is the province of the jury to determine from such evidence the proof which constitutes negligence. There is also no doubt, where the facts are undisputed \* \* \* that the question of negligence is one of law.’

Assuming for the moment that Mrs. Hurlburt was driving the horse on the occasion in question, and was chargeable with exercising that degree of care imposed by law, upon one in charge of a team, and driving along a highway, as in this case, could there be any doubt as to the conclusions of fair-minded men as to her contributory negligence under the facts stated? Under the assumed case, it would be her duty to look. This she said she did. If she looked, she was chargeable with seeing what there was to be seen, by an ordinarily prudent person, in the exercise of reasonable care while looking. If she looked attentively, and failed to see what was plainly to be seen, then she was negligent; and if such negligence was a proximate cause of the injury, then in such case we think the jury should have been told to return a verdict for the company. *N. P. Railroad v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; *I. C. R. R. Co. v. Ackerman*, 144 Fed. 959, 76 C. C. A. 13; *Kallmerten v. Cowen*, 111 Fed. 297, 49 C. C. A. 346; *Philadelphia &*



*R. R. Co. v. Peebles*, 67 Fed. 591, 14 C. C. A. 555.

\* \* \*

Thus it appears that she had voluntarily entered upon the task of looking out for her own safety, and, if her evidence is to be believed, she was using her own eyes and ears for that purpose, wholly independently of her husband, and was therefore responsible for her own personal negligence. *Cotton v. Willmar & Sioux Falls Ry. Co.*, 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935; *Rebillard v. Minneapolis Ry. Co.*, 216 Fed. 503, 133 C. C. A. 9.

If both of them were engaged in looking and listening for a train, as they evidently were, then the negligence of each, while so engaged, must be regarded as the negligence of both of them. *Railroad v. Kistler*, 66 Ohio St. 327, 64 N. E. 130. So that from any view that we take of the undisputed evidence of the defendant in error, it follows that she is chargeable with her own negligence on the occasion in question. \* \* \*

We are of the opinion that it was error to refuse the company's motion for a directed verdict at the close of all the evidence."

The decisions in our State are uniformly to the same effect. A leading case in this State is that of *Herbert v. Southern Pacific Company*, 121 Cal. 227, 53 Pac. 651, where it is said:

"But the cases arising from injuries suffered at railroad crossings have been so numerous, and upon certain points there has been such absolute accord, that what will constitute ordinary care in such a case has been precisely defined, and if any element

is wanting, the courts will hold as a matter of law that the plaintiff has been guilty of negligence. And, when injury results which might have been avoided by the use of proper care, the plaintiff cannot recover, although the defendant has also been guilty of negligence. In this special case the amount of care, as well as the nature of it, has been well settled."

In the case of *Holmes v. South Pac. Coast Ry. Co.*, 97 Cal. 161, 31 Pac. 834, the court says:

"A railroad track upon which trains are constantly run is itself a warning to any person who has reached the years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to be struck by a passing train, without the exercise of constant vigilance in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving an injury; and the failure of such a person so situated with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses in order to avoid the danger incident to such situation, is negligence *per se*."

In the case of *Pepper v. Southern Pacific Co.*, 105 Cal. 389, 38 Pac. 974, the following language is used:

"There is not only no evidence that the deceased used any care or made any effort to ascertain whether a train was approaching, but the evidence excludes the possibility of his having used any reasonable care or caution in approaching the crossing. The fact that his view was obstructed

after he crossed University Avenue, made it negligence on his part to drive at a rate of speed which not only interfered with his hearing an approaching train, but made it difficult or impossible to stop. If he could not see an approaching train because his vision was obstructed ordinary care for his own safety required him to stop in order that his hearing should not also be obstructed, and *in any event to make his approach so slowly as to give him complete control of his team, and enable him to stop instantly if occasion required.* (Italics ours).

So far as the negligence of the deceased is concerned we see no conflict in the evidence; and it is well settled in this state and elsewhere, that, if his negligence contributed proximately to the accident resulting in his death, the plaintiff cannot recover, even though the defendant negligently omitted to give the warning of the approach of the train which the law and its duty required. \* \* \*

It is said, however, that the train was running at a rate of speed faster than usual. This could not affect the question, since the deceased could not have been misled by the unusual speed of the train, unless he saw or heard the train and undertook to cross ahead of it; *and to make such attempt and fail is conclusive evidence of negligence."*

In the case of *Herbert v. Southern Pacific Co.*, 121 Cal. 227, 53 Pac. 651, already referred to, Temple, J., speaking for the court says:

"He (the plaintiff) proceeded at the rate of from six to seven miles an hour, until he got within about three rods, whence he proceeded on a walk to the crossing. He could see from the eminence



from whence he had the last sight of the track that at that time the train was not within sixteen hundred and twenty feet of the crossing and would have to make that distance while he was going four hundred and fifty feet. That is, he would have known these facts had he known the precise distances, and these he did not know. He could only estimate. Nor did he know how rapidly the train would move.

\* \* \* As a matter of fact, they reached there at about the same time, though the plaintiff might have escaped 'with the skin of his teeth' had not his horse, startled by the sudden appearance of the engine, stopped at the track. \* \* \*

It was a most reckless race with death, and if it does not present a case free from doubt, such a case cannot be imagined."

In the case of *Studer v. Southern Pacific Co.*, 121 Cal. 400, 53 Pac. 942, it is said:

"The defendant is not liable for the injury sustained by the plaintiff, unless it occurred solely by its fault and negligence, and not in any degree through the fault or negligence of the plaintiff. (See also *Railroad Co. v. Houston*, 95 U. S. 697; *Memphis etc. R. R. Co. v. Copeland*, 61 Ala. 376)."

In the case of *Green v. Southern Pac. Co.* 132 Cal. 254, 64 Pac. 256, the deceased was killed while crossing the track of the defendant. In discussing the question, the court says:

"It is the settled rule in this state that contributory negligence is a defense to be affirmatively established by the defendant, unless it is shown or can be inferred from the evidence given in support of the



plaintiff's case. (*Robinson v. Western Pacific R. R. Co.*, 48 Cal. 426). It is also well settled that while contributory negligence is a question of fact to be determined by the jury, yet when the facts are undisputed the question is one of law for the court (*Glasscock v. Central Pacific R. R. Co.*, 73 Cal. 137); and if evidence thereon is without conflict, and of such a character that the only conclusion to be reasonably drawn therefrom is in favor of its existence, the court may grant a non-suit at the close of the testimony or may direct a verdict for the defendant. (*Davis v. California Street R. R. Co.*, 105 Cal. 131; *Herbert v. Southern Pacific Co.*, 121 Cal. 227).

The noise caused by the rumble of his empty wagon was an additional reason for caution, and his knowledge that the track was hidden by the corn was a reason for his taking more than ordinary precautions against meeting the train. Instead of taking any precautions, the testimony of all who saw him is that he was driving at a rapid gait towards the crossing. The only inference to be drawn from his conduct, in view of his knowledge of the surroundings, is, that he was attempting to get across the track before the cars should come along. If such be the case, it can only be regarded as recklessness. (*Hager v. Southern Pacific Co.*, 98 Cal. 309).

In the case of *Green v. Southern Cal. Ry. Co.*, 138 Cal. 1, 70 Pac. 926, it appeared that this also was an action brought by the relatives of the deceased to recover damages for her death, she being killed while attempting to cross the track of the defendant. This case, in some particulars, is pre-

cisely similar to the case at bar, as it appears from the decision that the deceased and the lady accompanying her drove right along, without looking to the east, or stopping to listen until the horse was within a few feet of the track, and then seeing the train nearly upon them, the horse was whipped and made to cross immediately in front of the locomotive, which struck the wagon and caused the damage. In commenting upon the testimony, McFarland, J., speaking for the court, says:

“This was extreme carelessness and recklessness. If they had stopped to listen, or after passing the foundry had looked over or through the picket fence, or had looked when they came to the line of the right of way, they would have seen the approaching train, and could have avoided any danger. They could have escaped by stopping, instead of whipping the horse in front of the locomotive; but carelessness had been committed before reaching that point. Their conduct was simply that of one who without any care whatever recklessly goes in front of a rapidly and nearly approaching train; and if that conduct does not constitute contributory negligence, then a railroad company must be held liable for damages in all cases of collision, without any reference to the conduct of the parties injured.”

In the later case of *Green v. Los Angeles etc. Ry. Co.*, 143 Cal. 31, 76 Pac. 719, the same principles of law are asserted. The evidence in that case discloses that the deceased approached the track of the defendant on foot and by daylight at a point from which it was plainly visible to a dis-

tance of eight hundred feet to the eastward. That when thirty feet distant from the track the deceased was seen to look towards the east, and then immediately advance along a path which crossed the track at an angle of about thirty degrees. She then advanced slowly along the path without again looking up, and when in the act of stepping on the track she was struck by the locomotive and killed. In the course of the decision the court says:

“Under these circumstances it is clear, in view of numerous decisions of this court, and of the great weight of authority elsewhere, that she cannot be acquitted of culpable negligence directly contributing to the fatal result. While it is true that negligence is ordinarily a question of fact, it is, in some cases, a conclusion of law. \* \* \*

A person on foot, in possession of all his faculties, and in complete control of his own movements, stepping on a railroad track immediately in front of a train which has been moving eight hundred feet at a speed of less than thirty miles an hour, in full view, is clearly guilty of negligence. Upon this point the case of *Holmes v. South Pacific Coast Ry. Co.*, 97 Cal. 167, is conclusive authority. There it was said:

‘A railroad track upon which trains are constantly run is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary intelligence, that it is not safe to walk upon it, or near enough to it, to be struck by a passing train without the exercise of constant vigilance, in order to be made aware of the approach of a locomotive, and thus be enabled to avoid receiving injury; and the failure of such person so



situated with reference to the railroad track, to exercise such care and watchfulness, and to make use of all his senses in order to avoid the danger incident to such a situation is negligence *per se*.' This statement of the doctrine of negligence *per se*, made ten years ago, was based upon several decisions of this and other courts, cited in the opinion of Justice DeHaven, and the rule has been applied in a number of more recent cases decided here. (See *Herbert v. Southern Pacific Co.*, 121 Cal. 227; *Bailey v. Market Street Ry. Co.*, 119 Cal. 329; *Lee v. Market Street Ry. Co.*, 135 Cal. 295; *Green v. Southern California Ry. Co.*, 138 Cal. 1, and cases cited).

These opinions show that persons who cross railroad tracks, either on foot or in vehicles, are strictly held to the duty of careful observation and attention. In each of these cases the plaintiff was injured notwithstanding some care on his part. In each case a judgment of non-suit was sustained. In each case the defect in plaintiff's cause of action was the same. The defect was, that though he exercised care at first, he did not continue to be careful, but became inattentive to his surroundings before he reached a place of safety.

To be sure the statute requires a railroad company to give specified warnings, but it neither takes away a man's senses nor excuses him from using them. The danger may be there; the precaution is simple. To stop, to pause, is certainly safe. His time to do so is before he puts himself in the very road of casualty."

The latest expressions of our Supreme Court are all in line with the doctrine thus announced. One



of the latest expressions is that found in the case of *Larrabee etc. v. Western Pacific Ry. Co.*, 52 Cal. Dec. 601. (Dec. 4, 1916), 161 Pac. 750.

This action was brought to recover damages from the defendant for causing the death of the plaintiff's intestate, the same as here. Trial was had before a jury which gave its verdict for the plaintiff, from which an appeal was prosecuted.

The facts appear to be that the deceased, while traveling southward in a horse-drawn hay wagon along the county road, was struck by defendant's train coming from the north and moving in the same direction as was deceased's wagon. He was then returning from Marysville on his empty hay wagon. The railroad tracks were built upon an embankment about seven feet above the normal grade of the county road. The county road approach to the railroad crossing was by an easy grade. Weeds were growing along the top of the embankment. The time was mid-day. The train, a special, was traveling from 55 to 60 miles an hour. The engineer observed the deceased was traveling towards the crossing, but was in a place of perfect safety. Larrabee's horses were traveling at a walk. When the engineer discovered that he was paying no attention to the approaching train the emergency brakes were applied, without success. Larrabee drove upon the track without either stopping, or looking, or listening; or, as the Supreme Court says, if he did look and listen, and under these circumstances heard the whistle and observed the

approach of the train, as he must have done, for admittedly the train would have been visible to him while still in a place of safety at a distance of fifteen hundred feet from the crossing, the unescapable conclusion is that he drove upon the track in wanton carelessness. The Court, in considering the question, says:

“Contributory negligence, of course, presupposes a primary negligence upon the part of defendant, and, for the purpose of this consideration only, it will be assumed that defendant was so negligent.

\* \* \*

In this case the positive and uncontradicted evidence discloses that the deceased did not exercise ordinary care, for if he had done so he could easily have escaped his fatal accident. \* \* \*

Moreover, as he ascended the slight grade of the county road approaching the track, he was beyond peradventure of doubt above the obstruction of the weeds while still in a place of safety. He was familiar with the crossing and its environments, he knew of the weeds, and their presence, and if they did interfere with his sight, this so far from justifying him for his failure to use other precautions, imposed upon him the duty of doing so. \* \* \*

There is thus an abundance of direct evidence to show that the deceased did not observe the legal requirements of ordinary care—the requirements of stopping and looking and listening—before he essayed the fatal crossing. The evidence to this effect is direct, positive and uncontradicted. The uncontested facts themselves speak convincingly to the same effect. The man was driving in a slow moving wagon, in broad daylight, was approaching

a crossing with which he was perfectly familiar, and approaching it under circumstances where he could with perfect safety have stopped his progress and looked back to see whether or not a train was approaching him from behind, his view of that train was unobstructed for at least fifteen hundred feet—these very facts overcome the presumption of the exercise of due care, and, as said by this court in *Herbert v. Southern Pacific Co.*, *supra*, ‘raise a presumption that he did not take the required precautions. \* \* \*

Upon this proposition the court directly instructed the jury that if they found ‘that at and just prior to the accident defendant’s train was running at an unusual rate of speed, this would not relieve the deceased from the duty resting upon him upon approaching said crossing to stop and look and listen for such approaching train, and if he failed so to do, and such failure contributed directly or proximately to the accident, then, regardless of said speed of said train, your verdict must be for the defendant’. The conclusion is unescapable that the jury ignored this instruction in reaching its verdict and that its verdict is, therefore, against the law.”

In the case of *Thompson v. Southern Pacific Co.*, 23 Cal. App. Dec. 488 (Sept. 28, 1916), 161 Pac. 21, the same doctrine is announced. In that case a verdict was rendered in favor of the plaintiff and against the company for more than \$17,000, the verdict being reversed by the Supreme Court on the ground that there was no evidence to support it.

From the facts, it appears that the plaintiff left Dinuba at about four o’clock in the afternoon of the



accident, traveling in an automobile. That the plaintiff, as he approached the crossing, looked in a southeasterly direction and listened for the purpose of ascertaining whether or not there was a train approaching the crossing, but did not see or hear one. That about 150 yards West of the crossing the plaintiff brought his automobile down to a slow gait and thereafter moved slowly toward the railroad crossing. That there was a row of tall sunflowers extending along the right of way which obstructed the view. That as he approached the crossing he did not stop his machine or look or listen for an approaching train. That he could not have seen it if he had done so unless he had gotten out of the machine and walked up the track. Commenting on this state of facts, the Supreme Court says that the evidence showed very clearly that he was chargeable with such contributory negligence as to preclude recovery:

“In other words, he did not exercise that due care for his own safety which the law demanded of him. It was his duty to stop and look and listen, at some point where such conduct would be effective. According to his own testimony, he knew of the obstructions to his view. But if he had not known of them before, he certainly observed them that day when he attempted to see if any train was approaching. Common prudence under such circumstances would dictate that he bring his machine to a full stop before attempting to cross the track. If he had done so, he would undoubtedly have heard the train approaching. But to exercise due care, under



the situation as revealed to him, the consensus of the opinion of prudent men would require him, if necessary to ascertain whether his life was in danger, to get out of his machine and go forward a few feet on foot in order that the matter might be placed beyond peradventure. We may say, in passing, that the testimony of the plaintiff as to the obstructions of the view seems almost incredible in the light of the whole record, but accepting his statement as true, his misfortune is attributable to his own carelessness. \* \* \*

It is true, as declared in the opinions, that the rule requiring the traveler to *stop* is not an absolute one. If the view is entirely unobstructed, the traveler, while going toward a crossing may see whether a train is approaching in dangerous proximity. Of course, in a case like that it would be idle to require the traveler to stop to find out something that he can ascertain just as well without stopping. He must, however, avail himself of the vision and if he is exercising ordinary care, he need not stop except to allow an approaching train to pass in order to avoid a collision. \* \* \*

Among the instructions given to the jury in that case is one that the plaintiff had the right to assume, until he reached the point where he might look up and down the track, but no train was approaching the crossing because there was no sound of bell or whistle. This instruction was held to be erroneous. The Supreme Court says:

“If the traveler had the right to assume that defendant’s employees would observe the law requiring them to ring the bell and sound the whistle

when approaching the crossing, he would, of course, have a right to rely upon receiving such information of approaching danger and would be entirely excusable for neglecting to avail himself of any other source of knowledge. Again, if he had a right to so assume, if no bell as a matter of fact was rung or whistle sounded, he would have a right to assume that no train was in fact approaching, and he would not be chargeable with negligence if he acted upon that assumption and proceeded to cross the track.

In *Huston v. Southern California Ry. Co.* 150 Cal. 703, it is said: 'It is not the law of this state that a person approaching a railroad crossing is authorized to assume that the person operating a train will not in any way be negligent in that operation. This doctrine has been asserted in some of the states, but is opposed to the law as laid down in the decisions of this state and of the Supreme Court of the United States. Such a rule would abrogate the doctrine of contributory negligence in all such cases.' "

In the case of *Martz v. Pacific Elec. Ry. Co.*, 23 Cal. App. 513 (Oct. 2, 1916), 161 Pac. 16, the record shows the action is one brought by the widow and three minor children to recover damages on account of the death of Martz, alleged to have been caused by the defendant company. The accident occurred at two o'clock in the afternoon at a highway crossing in Los Angeles County. There is no testimony from any observer as to whether the deceased looked or listened for the approach of the car. There was a conflict in the evidence as to

whether warning signals were given, also as to the rate of speed of the defendant's car. The question presented to the jury was whether or not a person so traveling and using reasonable care in observing would have seen the approaching car, notwithstanding the obstructions of trees and brush along the highway and certain poles erected at intervals along the railroad tracks. It was admitted that the railroad tracks along which the electric car would approach the crossing would be plainly visible from the automobile during at least the last 60 feet of its approach to the south track, and as shown by the photographs, the curve of the railroad was such that the car would have been plainly visible if it was anywhere within 1000 feet of the crossing. The deceased was about 52 years old, in good health, and was driving alone, and the railroad track was in plain view as he came down the road.

Commenting upon these facts, the Supreme Court says:

"This being so, even if (as we must assume to be the fact) he had not seen any approaching car before coming opposite the white building, it was his duty to approach the crossing with reasonable care to have his automobile under control. If we assume that he did this, then when he came within sixty feet of the southerly railroad track he was in a safe situation at all events. If there was no approaching car within a distance of one thousand feet, he would have ample time to cross. For at the rate of thirty miles per hour the railroad car would require at least twenty-three seconds to reach the



point of intersection; whereas the automobile, even at a five-mile rate, would be across in eight seconds. On the other hand, if the approaching railway car was anywhere within the distance of one thousand feet, Mr. Martz must have seen it if he made the most ordinary use of his faculties, and this at least he was bound to do. (*Griffin v. San Pedro etc. R. R. Co.*, 170 Cal. 772) (2) The rule is applicable to electric railroads operated under conditions similar to the operation of steam railroads. (*Loftus v. Pacific Elec. Ry. Co.*, 166 Cal. 464). And if the car thus observed by the deceased was approaching at such speed and was then within such distance as to cause reasonable apprehension of danger, it was negligence on the part of the automobile driver to attempt such a crossing. Such attempt would be the voluntary assumption of a risk, and for injuries resulting therefrom and which the defendant then had no further opportunity to avoid, the law does not intend to provide compensation.

The only other alternative state of facts which seems possible under the evidence is that Mr. Martz came down the avenue and into the zone of danger at a rate of speed which was reckless under the circumstances, and thus heedlessly placed himself where the concurrent negligence of the defendant caused his death. In this case also there is no right of recovery. (3) Where the physical facts shown by undisputed evidence raise the inevitable inference that the person approaching a railroad crossing did not look or listen, or that having looked and listened, he endeavored to cross immediately in front of a rapidly approaching train that is plainly open to his view, he is as a matter of law guilty of contributory negligence.



It seems clear that there is no question shown upon any possible state of facts consistent with the evidence which can authorize a verdict such as was rendered in this case. The defendant was clearly entitled to a verdict in its favor. Having reached this conclusion, we deem it unnecessary to discuss alleged errors in the instructions given the jury. With respect to the objections urged against these instructions, we express no opinions.

The judgment and order are reversed."

The latest expression of the Supreme Court of California relating to the subject under discussion will be found in the case of *Arnold et al vs. San Francisco-Oakland Terminal Railways*, decided April 20, 1917, and found reported in "The Recorder", a law publication printed in San Francisco, under date of April 25, 1917. From that case we quote as follows:

"On the 23rd of April, 1913, Joseph C. Arnold was killed by a collision between an automobile, which at the time he was driving, and a car run by the defendant on its San Pablo avenue line. The plaintiffs, being the widow and children of Arnold, began this action to recover the damages which they have suffered from his death, alleging that the collision was caused by the negligence of the defendant. The cause was tried by a jury, verdict was returned for the plaintiffs in the sum of thirty thousand dollars and judgment was given accordingly. The defendant appeals from the judgment and from an order denying its motion for a new trial.

“For the purposes of our consideration of the case it will be assumed that the evidence was sufficient to sustain a finding that the negligence of the defendant was an operative cause of the collision and injury complained of. The defendant claims that the evidence showed, as a matter of law, that the negligence of Arnold contributed to the injury which caused his death.

“The evidence as to the controlling facts on this question is not substantially conflicting. The defendant was maintaining and operating a double track street car line on San Pablo avenue running from Oakland to Richmond. Schmidt lane, a street sixty feet wide, runs from the east into San Pablo avenue at a point in Contra Costa county about a mile north of the Alameda county line. It does not extend west beyond San Pablo avenue. The western track is used for southbound cars and the eastern track for northbound cars. Its grade for about three hundred feet south of the junction ascends toward the north one foot in a hundred. At the southeastern corner of the junction there is a two-story building, known as Timm’s saloon, which obscured the view from the lane southward. For a distance of about five hundred feet east from the junction other objects obscured the view from the lane southward. Schmidt lane descends toward the avenue for that distance at a grade of about one foot in a hundred. The part of San Pablo avenue south of Schmidt lane and east of the street car tracks, including the sidewalk, was 31.4 feet wide. North of Schmidt lane it was 50 feet wide. In front of Timm’s saloon and extending around the corner was an awning supported by five posts, one on the north end and the others on the avenue front.

This occupied thirteen feet of the avenue, leaving eighteen feet between it and the street car tracks. It projected eight feet north of the south property line of the lane. The ground all about was practically level and automobiles could travel the avenue either to the north or south. Arnold was 36 years old, mentally and physically sound and in possession of his usual faculties at the time. He was familiar with the conditions at the junction. Driving westerly on Schmidt lane at about the center thereof he approached the junction at a speed of about ten miles per hour intending to cross the tracks and turn south on the avenue on the west side of the tracks. As he reached a point in Schmidt lane from forty-five to fifty-five feet east of the eastern car track he saw a northbound car coming on the track at a distance from sixty-five to eighty-five feet south of the intersection of the projected line of Schmidt lane with the car tracks. Its speed was estimated at from twelve to twenty-five miles per hour. The automobile was a short, five-passenger machine, occupied by himself and three other persons, eleven feet in length over all and weighing about sixteen hundred pounds. The evidence was that with the use of ordinary care and skill it could be stopped within a space of fifteen or twenty feet when going at the rate he was traveling and that a person of ordinary skill, even when going much faster than he was going at the time, with ordinary care, could have turned from the lane, either to the north or to the south, on San Pablo avenue east of the car tracks without coming in dangerous proximity to a car passing thereon. Upon seeing the car Arnold first swerved slightly to the left or south and then swerved slightly to



the north and finally attempted to cross the tracks in front of the coming car. The result was that he collided with the car at a point about opposite the center of Schmidt lane.

“The bare statement of the facts proves beyond question that the lack of ordinary care or skill on the part of Arnold was a directly contributing cause of his injury. He saw the car coming when he was not nearer than forty feet from the tracks. He had abundant time and space to turn to the south, or to the north, or to stop, and avoid danger, if he had possessed ordinary skill and had used ordinary care. No other conclusion follows than that by the lack of ordinary skill or ordinary care he failed to take either course. The only thing that will excuse him of lack of ordinary care is the admission that he did not possess ordinary skill. If the latter be true, it was lack of ordinary care for him to trust himself to drive an automobile in a place of that kind. In either case his contributory negligence is established.

“The argument that Arnold was excusable because he was surprised by the close proximity of the special car to a car that had just passed the junction and that he was not expecting another north-bound car so soon, is deprived of all force by the fact that he actually saw the special car in ample time to have avoided it. To say that the unexpected appearance of a car on the track was sufficient to startle him so as to deprive him of the use of his reason and senses is to convict him of being incompetent to drive an automobile at all on the public streets. There is no evidence that he was unskillful in driving an automobile. But, as we have said, if he was unskillful it was negligence



for him to undertake to drive it at such a place. The evidence proves beyond doubt that he saw the car in time to have avoided it with the use of ordinary care.

“The evidence does not sustain the plaintiff’s contention that the defendant is liable under the doctrine of the last clear chance. This doctrine applies where the injured party by his own negligence has placed himself in a position of danger from which he cannot extricate himself, or of which he is obviously unconscious, and the defendant, seeing or knowing his peril or seeing or knowing facts from which a reasonable man would believe him to be in peril, and being able by the use of ordinary care to avoid injuring the plaintiff in his perilous position, fails to use such care and thereby causes the injury. (*Thompson v. Los Angeles, etc. Co.*, 165 Cal. 755; *O’Brien v. McGlinchy*, 68 Me. 552; *Holmes v. South P. etc. Co.*, 97 Cal. 169; *Sego v. S. P. Co.*, 137 Cal. 407; *St. Louis etc. Co. v. Schumacher*, 152 U. S. 77; *Illinois Central Ry. Co. v. Ackerman*, 144 Fed. 959; *Denver City Tramway Co. v. Cobb*, 164 Fed. 41; *Green v. Los Angeles etc. Co.*, 143 Cal. 41).

“ ‘A street car cannot go upon the street except upon its rails and hence it has the better right to that space, to which others must yield when necessary’. (*Scott v. San Bernardino etc. Co.*, 152 Cal. 610; *Clark v. Bennett*, 123 Cal. 279; *Bailey v. Market Street Ry. Co.*, 110 Cal. 327). It was the duty of Arnold, upon approaching the crossing, to give way to a car of the defendant which was about to pass at the same time, if necessary to avoid a collision, since he could give way while it could not. The defendant’s motorman was not required to

presume that Arnold would not perform this duty. He had the right to presume that Arnold would stop or turn aside, until the conduct of Arnold was such as should reasonably have led him to apprehend the contrary. So long as it appeared that Arnold, with reasonable care, could stop his automobile, or turn it to one side or the other, so as to avoid a collision, and there were no obvious indications that he might not do so, the motorman had the right to assume that he would do so and upon that assumption to proceed along the track. (*Thompson v. Los Angeles, supra.*) He could have stopped the automobile or turned it aside, in safety if he had begun to do so when he was twenty-five feet away. He displayed no obvious intention to cross the track ahead of the car until the moment when, after swerving to the south, apparently in an attempt to pass south to the eastward of the tracks, he again swerved to the north, apparently with the purpose of turning northerly east of the track, or of passing in front of the street car. The latter swerve did not occur until Arnold had proceeded beyond the east property line of San Pablo avenue several feet. The evidence indicates that it took place when he arrived opposite the corner of the awning, which was 13 feet west of the property line and 18.4 feet east of the car track. The motorman testified that as soon as he saw Arnold coming out of Schmidt lane he did everything that could be done to stop the car and that he stopped it as quickly as it could have been stopped after that moment. This indicates that he started to stop the car even before he had reasonable cause to believe that Arnold would attempt to cross the track in front of the car. There is no substantial evidence contradictory

of this. The doctrine of the last clear chance could not become applicable until Arnold's negligence had brought him so close to the track that he could not by ordinary care either stop or turn aside so as to avoid a collision, or until his conduct showed that he intended to hazard a crossing ahead of the car, and when these conditions became apparent the utmost care by either party would have been unavailing to prevent the accident."

In view of these decisions, indicating a uniformity of principle as enunciated by the various courts, there would seem to be no room for controversy in this case, but that the motion of plaintiff in error for a non-suit should have been granted, or that in lieu thereof the court should have instructed the jury that as a matter of law the deceased was guilty of such contributory negligence as precluded a recovery herein against plaintiff in error, and that the verdict should be in favor of such plaintiff in error.

The decisions to which we have thus referred at length and those hereinafter mentioned, are in accord with the unbroken weight of authorities, in that all the authorities practically agree that if two persons are engaged jointly in a common enterprise requiring for its purpose that they use and occupy a conveyance of some sort, each assumes a responsibility for his colleague's conduct, and if either is injured by the negligence of a third party and the concurring negligence of his companion, the mere fact that he was not at the time driving the common



conveyance will not enable him to recover from the wrongdoer.

When the driver of the vehicle and the injured passenger are engaged in a common enterprise or purpose in which each to some extent is responsible for the acts and conduct of the other, the driver's negligence is to be imputed to the passenger.

*Payne v. Chicago, R. I. & P. R. Co.*, 39 Iowa 523;

*Nesbit v. Garner*, 75 Iowa 314, 1 L. R. A. 152, 9 Am. St. Rep. 486, 39 N. W. 516;

*McBride v. Des Moines City R. Co. (Iowa)*, 109 N. W. 618.

If two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the means and agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to all the others.

*Koplitz v. St. Paul*, 86 Minn. 373, 58 L. R. A. 74, 90 N. W. 794;

*Johnson v. Gulf C. & S. F. R. Co.*, 2 Tex. Civ. App. 139, 21 S. W. 274.

When two men, employed together, are driving along a railroad track at midnight, seated side by side in an open wagon, returning home from marketing a load of fish; and the track they occupy is one of a pair laid in a public highway with a road-



way upon each side of sufficient width to accommodate safely road vehicles; and both are familiar with the locality, and have knowledge of the trains that run and the method of running them upon such track; and the one not driving makes no effort to avoid danger, no objection to going upon the track, no request to turn into the roadway, and is in full control of his own actions,—he is chargeable with his comrade's neglect; and, if struck and injured by a railroad train, is guilty of contributory negligence as a matter of law.

*Donnelly v. Brooklyn City R. Co.*, 109 N. Y.  
16, 15 N. E. 733.

When an intoxicated man is injured at a railroad crossing by the collision of a train of cars negligently operated with an open wagon driven by a companion, who did not exercise ordinary care and watchfulness in looking out for the train, and when the injured man himself exercised no care personally, the team and wagon being under the joint care and control of the injured man, the driver, and two others, their companions, no recovery can be had of the railroad.

*Payne v. Chicago R. I. & P. R. Co.*, *supra*.

A father and son using a horse and wagon for the purpose of moving goods as a business are engaged in a joint enterprise, so that each, when they are upon the vehicle together in the course of that occupation, is responsible for the conduct of the

other; and the son's negligence, if any, while driving, is imputable to the father in case of the latter's injury by a colliding trolley car.

*Schron v. Staten Island Electric Co.*, 16 App. Div. Ill., 45 N. Y. Supp. 124.

Two persons using together a horse and wagon to move furniture are engaged in a joint enterprise, and the negligence of the driver is imputable to his companion, when the latter suffers an injury in a collision with a street car.

*Cass v. Third Ave. R. Co.*, 20 App. Div. 591, 47 N. Y. Supp. 356.

When one of several persons engaged in the joint prosecution of a common purpose, and occupying a wagon driven by one of their number, is killed or injured by the negligence of a railroad company while driving over its track at a highway crossing, each of the party is held responsible for the acts and conduct of the rest, for each is agent of the others; and it is incumbent to prove, in an action against the railroad company for causing the injuries, or death, not only that the deceased or injured person was free from negligence, but that his companion who drove the wagon in which he rode was also guiltless.

*Boyden v. Fitchburg, R. Co.*, 72 Vt. 89, 47 Atl. 409.

When two mechanics using a private wagon to transport themselves and their tools drove upon a

railroad track at a highway crossing in broad daylight without either one of them looking or listening for the approach of a train, and were run down by a locomotive and train of cars that they would have had ample time to avoid if they had looked or listened, they were guilty of such contributory negligence as will prevent either of them from recovering of the railroad company for his injuries, even if the latter was negligent; and the driver, for all the purposes of an action, must be regarded as agent of the other, if the latter was in no wise disabled.

*Omaha & R. Valley R. Co. v. Talbot*, 48 Neb. 628, 67 N. W. 599.

It may be taken, as a rule of law, everywhere recognized, that a passenger in any conveyance, public or private, related or unrelated to his driver, must, in order to recover for injuries sustained through the negligence of a third party, be himself wholly free from contributory fault.

Conceding the rule that a person injured while riding in a vehicle driven by another is not chargeable with the contributory negligence of the driver in which he did not participate, it does not absolve him from all personal care; and, if such driver is a careless and reckless one, and the injured person knows it, proof of these facts is competent and relevant upon the issue of the passenger's own contributory negligence in going to ride with such a driver.

*Bresee v. Los Angeles Traction Co. (Cal.)*,  
5 L. R. A. (N. S.) 1059, 85 Pac. 152.

A well-recognized exception to the rule that the contributory negligence of the driver of a private conveyance is not to be imputed to his guest or companion when the latter is injured by the negligent act of a third party is when the injured person is himself a participant in the contributory negligence, or fails to exercise, under the circumstances of the case, such care as he should or might exercise to protect himself.

*Colorado & S. R. Co. v. Thomas*, 33 Colo. 517, 70 L. R. A. 681, 81 Pac. 801.

It is not enough to enable one to recover of a railroad company for an injury inflicted by its moving train at a railroad crossing, through the negligence of the railroad employees while he was riding in a vehicle driven by another, to show that the driver was not negligent; but he must go further and show that he was free from negligence himself.

*Chicago, S. F. & C. R. Co. v. Bentz*, 38 Ill. App. 485.

If one is injured by a third party's negligence while riding on a wagon driven by another, any contributory negligence of the driver which is caused by the injured person's own conduct, will bar a recovery. His conduct, therefore, is a proper subject for inquiry to determine if he was contributorily negligent. The decisions so hold; but they do not hold that the negligence of the driver must be attributed to the injured one irrespective of his



own conduct. Any decisions of other jurisdictions so holding are not authority, but are in conflict with well-established doctrine in the state of Illinois.

*West Chicago St. R. Co. v. Dedloff*, 92 Ill. App. 547.

A plaintiff cannot recover of a defendant guilty of wrongful negligence whereby he sustains injuries if his own negligence, or that of his servant, or anybody else for whom he is responsible, contributed to the injury.

*Albion v. Hetrick*, 90 Ind. 545, 46 Am. Rep. 230.

One who is injured by the descent of a tollgate bar while riding in a private conveyance driven by its owner in an intoxicated condition, and attempting to run the gate without paying toll, although not chargeable with imputed negligence of the driver, is not himself sufficiently free from personal negligence to warrant a recovery from the turnpike company.

*Brannen v. Kokomo G. & J. Gravel Road Co.*, 115 Ind. 115, 7 Am. St. Rep. 411, 17 N. E. 202.

A daughter riding in a buggy drawn by one horse driven by her father, and injured by collision with a train of cars while crossing a railroad track, is bound, in order to recover of the railroad company

for injuries received, to establish her personal freedom from contributory negligence.

*Cincinnati, I. St. L. & C. R. Co. v. Howard*,  
124 Ind. 280, 8 L. R. A. 593, 19 Am.  
St. Rep. 96, 24 N. E. 892.

Although the negligence of a husband in charge of a horse and carriage is not to be imputed to his wife riding with him, in case they were killed by a railroad train when driving across the track, she herself rested under the duty to exercise ordinary and reasonable care; and, if she omitted to warn her husband, or to do aught that she might and should have done to avoid the tragedy, her legal representative cannot recover from the railroad company.

*Miller v. Louisville, N. A. & C. R. Co.*, 128  
Ind. 97, 25 Am. St. Rep. 416, 27 N. E. 339.

Irrespective of any question as to whether or not the negligence of a driver of a private conveyance is to be imputed to his passenger in case of injury by a train of cars negligently operated at a railroad crossing, the passenger must be personally free from contributory negligence to recover of the railroad company for the injuries.

*Aurelius v. Lake Erie & W. R. Co.*, 19 Ind.  
App. 584, 49 N. E. 857.

Notwithstanding the rule that the negligence of a driver is not imputable to his guest when the latter

suffers injury by the negligence of another, it is as much the duty of the guest to use reasonable care and judgment to learn of and avoid danger as it is the duty of the driver.

*Vincennes v. Thuis*, 28 Ind. App. 523, 63 N. E. 315.

When an injury results to a traveler on a highway negligently obstructed by a municipality, under such circumstances that the municipal corporation would have been liable for the injuries had the traveler himself been free from the negligence; and such traveler is riding in a buggy as the guest of another, driving at a high and reckless speed, with knowledge of the obstacles and more or less intoxicated, on a dark night—his contributory negligence is plain, and defeats a recovery from the corporation. (*Ibid*)

Although a married woman riding in a vehicle driven by her husband, and sustaining an injury by another's negligence, is not imputable with the negligence of her husband, she is not excused from exercising due and ordinary care for her own safety.

*Wilfong v. Omaha & St. L. R. Co.*, 116 Iowa 548, 90 N. W. 358.

A woman injured by collision with a locomotive while driving across a railroad track upon a pleasure excursion in a vehicle furnished and driven by her escort, who had an equal opportunity with her companion to see and appreciate the danger,

and, knowing the driver's purpose to cross the track ahead of the approaching train, neither advised nor suggested caution or delay until it had passed, was herself guilty of contributory negligence sufficient to prevent her from recovering for her injuries upon the ground of negligence of the railroad company.

*Bush v. Union P. R. Co.*, 62 Kan. 709,  
64 Pac. 624.

And the rule is the same notwithstanding a finding of fact by the jury that she had no control over driver, horse or vehicle.

*Missouri, K. & T. R. Co. v. Bussey*, 66 Kan.  
735, 71 Pac. 261.

While one driving a vehicle hired from a livery stable and driven by the proprietor is not imputable with the driver's negligence in case of injury while crossing a railroad track in front of a running train, he must not himself be guilty of any personal negligence, and is not absolved from ordinary care on his part.

*Louisville & N. R. Co. v. Molloy*, 28 Ky. L.  
Rep. 1113, 91 S. W. 685.

Although a passenger in a vehicle owned and driven by another over whom he has no control is not imputable with the negligence of that other in approaching and crossing a railroad track, and has not the same degree of responsibility to the railroad



company as his driver, he is charged with a duty to do whatever is in his power to avoid an injury, and to be free from personal carelessness.

*State v. Boston & M. R. Co.*, 80 Me. 430,  
15 Atl. 36.

The same duty rests upon a wife riding with her husband that rests upon any other person accompanying another upon a drive, who has an opportunity to observe and give notice of impending dangers that may be avoided, and who is not absolved from all care because another is driving, although she may not be held to the same degree of responsibility as the driver.

*Whitman v. Fisher*, 98 Me. 577, 57 Atl. 895.

To recover of a railroad company for injuries sustained by a collision with one of its trains of the vehicle in which the plaintiff was driving across the railroad track, he is required to prove not only that the railroad company was negligent, but that his own negligence did not in any way contribute to his injury. The fact that he was riding with another person, who was carefully driving a reliable horse, does not aid his case. If he himself failed to use the care which prudence required, relying wholly upon his companion's vigilance, he must prove that companion to have been exercising due care not only in managing the horse, but in guarding against the danger of passing trains.

*Allyn v. Boston & A. R. Co.*, 105 Mass. 77.

A person seated beside the driver of an open wagon belonging to his and the driver's employer, and injured in a collision with a railway car, has no right to rely implicitly for his own safety upon the driver's care and prudence; but it is his duty, if the driver is approaching street-car tracks at a careless rate of speed, to attempt to have such speed reduced to a safe rate, and, if he makes no effort to that end, he is himself guilty of such contributory negligence as will prevent him from recovering from the railway company.

*Holden v. Missouri R. Co.*, 177 Mo. 456,  
76 S. W. 1045.

Few, if any, courts have held that an occupant of a vehicle may intrust his safety absolutely to its driver regardless of the imminence of danger or the visible lack of ordinary caution on the driver's part to avoid harm. The law in Missouri and in most jurisdictions is that, if a passenger is aware of the danger, and that the driver is remiss in guarding against it, and takes no care of himself to avoid injury, he cannot recover for the injury he receives. This is not because the driver's negligence is imputable to the passenger, but because the latter's own negligence contributes to his damage.

*Fechley v. Springfield Traction Co.*, 119 Mo.  
App. 358, 98 S. W. 421.

A wife riding on the seat of an open wagon beside her husband, who is in charge of and driving the

team, who is injured by a railroad train in a collision with the vehicle as it is crossing the railroad track upon the highway, when both she and her husband omit sufficiently to look and listen for an approaching train, and are both in possession of normal sight and hearing, is herself guilty of contributory negligence sufficient to bar her recovery of the railroad company for her injuries.

*Hajsek v. Chicago B. & Q. R. Co.*, 5 Neb. (Unof.) 67, 97 N. W. 327).

It is not less the duty of a passenger in, than of a driver of, a vehicle, where the passenger has the opportunity, to learn of, and, if practicable, avoid danger.

*Brickell v. New York C. & H. R. R. Co.*,  
120 N. Y. 290, 17 Am. St. Rep. 648,  
24 N. E. 449.

One who, upon another's invitation, takes passage in a private wagon driven by his host, cannot, without assuming entire responsibility for the driver's conduct, rely wholly upon his guardianship and vigilance, but is bound, if he would escape the imputation of the driver's negligence, to exercise care for his own safety, and be prudent and diligent in his own behalf, to the best of his ability, in dangerous places such as highway crossings of railroad tracks at grade.

*DeLoge v. New York C. & H. R. R. Co.*,  
92 Hun. 149, 36 N. Y. Supp. 697.

It is not less the duty of a woman riding in a wagon with her husband and about to drive across a railroad track to look and listen for approaching trains, than it is her husband's duty to do so; and, if she omits that duty, or omits to take any other precaution which an ordinarily prudent person would take in her circumstances, and is injured by an approaching train while crossing the track, she is chargeable with negligence, and cannot recover.

*Toledo & O. C. R. Co. v. Eatherton*, 20 Ohio C. C. 297.

A traveler riding in an open buggy beside the driver hired and employed for the journey, who was struck and killed by a passing railroad train at a highway crossing as he was driving over the track at a point where the oncoming train would have been seen for 1325 feet, if he had looked, is chargeable with negligence in attempting to drive across the track without stopping, looking and listening; and no recovery can be had of the railroad company for negligently causing his death.

*Dryden v. Pennsylvania R. Co.*, 211 Pa. 620, 61 Atl. 249.

One who rides in a vehicle owned and driven by a friend and companion, while not imputable with the latter's negligence in the presence of an unseen and unknown danger, is chargeable with negligence in driving on an obstruction in the highway in plain sight without warning or protesting to the driver;



and, if killed by the overturning of the vehicle by striking such obstruction, no recovery can be had for causing his death.

*Lohman v. McManus*, 9 Pa. Dist. R. 223.

In fact, the overwhelming weight of authority is to the effect that a person approaching a railroad crossing must look out for himself, and the fact that he is riding with another does not relieve him of the responsibility of exercising reasonable care for his own safety.

*Griffith v. Baltimore & O. R. Co.*, 44 Fed. 574, affirmed in 159 U. S. 603, 40 L. Ed. 274, 16 Sup. Ct. Rep. 105;

*Partridge v. Boston & M. R. Co.*, 107 C. C. A. 49, 184 Fed. 211;

*Nehrbas v. Central P. R. Co.*, 62 Cal. 320;

*Colorado & S. R. Co. v. Thomas*, 33 Colo. 517, 70 L. R. A. 681, 81 Pac. 801, 3 Ann. Cas. 700, 18 Am. Neg. Rep. 316;

*Chicago, S. F. & C. R. Co. v. Bentz*, 38 Ill. App. 485;

*Cincinnati, I. St. L. & C. R. Co. v. Grames*, 8 Ind. App. 112, 34 N. E. 613, 37 N. E. 421;

*Lake Shore & M. S. R. Co. v. Boyts*, 16 Ind. App. 640, 45 N. E. 812;

*New York C. & St. L. R. Co. v. Robbins*, 38 Ind. App. 172, 76 N. E. 804;

*Miller v. Louisville, N. A. & C. R. Co.*, 128 Ind. 97, 25 Am. St. Rep. 416, 27 N. E. 339;

*Wood v. Maine C. R. Co.*, 101 Me. 469, 64 Atl. 833;

- Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274;
- Richfield v. Michigan C. R. Co.*, 110 Mich. 406, 68 N. W. 218;
- Hinkley v. Wabash R. Co.*, 162 Mich. 546, 127 N. W. 668;
- Hutchinson v. St. Paul, M. & M. R. Co.*, 32 Minn. 398, 21 N. W. 212;
- Howe v. Minneapolis, St. P. & S. Ste M. R. Co.*, 62 Minn. 71, 30 L. R. A. 684, 54 Am. St. Rep. 616, 64 N. W. 102;
- Finley v. Chicago, M. & St. P. R. Co.*, 71 Minn. 471, 74 N. W. 174;
- Byars, v. Wabash R. Co.*, 161 Mo. App. 692, 141 S. W. 926;
- Mason v. Northern P. R. Co.*, 45 Mont. 474, 124 Pac. 271;
- Bennett v. New York C. & H. R. R. Co.*, 16 N. Y. Supp. 765, affirmed without opinion in 133 N. Y. 563, 30 N. E. 1149;
- Crawford v. Delaware, L. & W. R. Co.*, 24 Jones & S. 607, 1 N. Y. Supp. 339, affirmed in 121 N. Y. 652, 24 N. E. 1092;
- Flanagan v. New York C. & H. R. R. Co.*, 70 App. Div. 505, 75 N. Y. Supp. 225, affirmed in 173 N. Y. 631, 66 N. E. 1108;
- Hoag v. New York C. & H. R. R. Co.*, 111 N. Y. 199, 18 N. E. 648;
- Mittelsdorfer v. West Jersey & S. R. Co.*, 77 N. J. L. 698, 73 Atl. 538;
- Crossman v. P. & R. Co.*, 2 Chester Co. Rep. 350;
- Atlantic & D. R. Co. v. Ironmonger*, 95 Va. 625, 29 S. E. 319;

*Loach v. B. C. Electric R. Co.*, 16 D. L. R. 245, 27 West L. Rep. (Can) 407, 6 W. W. R., 322, 17 Can. Ry. Cas. 21, 19 B. C. 177.

The rule, as stated in *Elliott on Railroads*, Vol. 3, 2d ed. Sec. 1174, is that if the person riding in the vehicle knows that the driver is negligent, and he takes no precaution to guard against injury, he cannot recover, for in such case the negligence is his own, and not simply that of the driver. The plaintiff cannot rightfully omit to use care in blind dependence upon another, but must use care proportionate to the danger of which the facts convey knowledge.

A person riding in a buggy, upon the seat with the driver, is bound to exercise care, upon approaching a railroad crossing, to determine whether or not a train is approaching, and no recovery can be had for his death, resulting from a collision with a train, where, knowing that a train is approaching, he joins with the driver in testing the danger of attempting to cross the tracks in front of the train.

*Colorado & S. R. Co. v. Thomas*, 33 Colo. 517, 70 L. R. A. 681, 81 Pac. 801, 3 Ann. Cas. 700, 18 Am. Neg. Rep. 316.

So, a person injured at a railroad crossing, while riding in a cutter as the guest of another who was driving, was held guilty of contributory negligence as a matter of law, in *Lake Shore & M. S. R. Co. v. Boyts*, 16 Ind. App. 640, 45 N. E. 812, where it

appeared that he was familiar with the crossing and its surroundings; that he knew when approaching the crossing the time of the arrival of a local freight train from the north; that he knew the train had arrived, a part of which without the engine he saw standing at the depot; that when within 30 feet of the crossing, he had an unobstructed view of the side track, looking south a distance of 60 feet, which increased as he approached the track to 80 feet at 20 feet from the track; and that he failed to look and listen for an approaching train as required by law.

So, where a woman riding with the owner of a wagon and team, who was driving, was injured at a railroad crossing when a locomotive struck the rig, the court in *Lake Shore & M. S. R. Co. v. Miller*, 25 Mich. 274, in holding plaintiff guilty of contributory negligence, stated that it must be laid down as a principle of law that persons about to cross a railroad track are bound to recognize and to make use of the sense of hearing as well as of sight,—and if either cannot be rendered available, the obligation to use the other is the stronger,—to ascertain, before attempting to cross it, whether a train is in dangerous proximity; and if they neglect to do this, but venture blindly upon the track without any effort to ascertain whether a train is approaching, it must be at their own risk. Such conduct is of itself negligence, and should be so pronounced by the court as a matter of law.



So, plaintiff's intestate, a woman, while riding in a buggy with another woman who was driving, having attempted to cross before a train, was held guilty of contributory negligence in *Richfield v. Michigan C. R. Co.*, 110 Mich. 406, 68 N. W. 218, the court stating that the rule that where, by the negligence of the defendant, the plaintiff was put in a place of danger, and if in an attempt to extricate himself from it he did not take the best hazard, he would not be charged with contributory negligence, was inapplicable to this case. There is not a particle of showing that the woman exercised the least care in approaching this crossing. They were familiar with the streets and the crossing, and yet drove along laughing and talking, and apparently giving no heed to the approach of a train. If they had been exercising any care, they would have heard or seen what others saw and heard. They were not drawn into a position of peril by the negligence of the defendant, but by their own negligence, had placed themselves in such a position, and being there took their chance of crossing in front of the train. We think the court should have directed a verdict in favor of the defendant.

In *Hajsek v. Chicago B. & Q. R. Co.*, 5 Neb. (Unof.) 67, 97 N. W. 327, plaintiff and her husband, as they neared the railroad crossing, and while 90 or 100 feet from the track, looked both ways and listened for an approaching train, at which time neither saw nor heard anything to indicate the approach of a train. It was shown that a train

under the circumstances indicated would have been visible for several hundred feet before it reached the crossing. The headlight on the engine was burning. If plaintiff or her husband had listened or looked, they could scarcely have helped seeing the train. They were both seated on a spring seat on the wagon, and the opportunities for observation of plaintiff were equal, if not superior, to those of her husband, who was driving the team. The failure of plaintiff to look and listen for the train during the time they were passing over the 90 or 100 feet, and during which time the train would have moved half a mile, was held such contributory negligence as precluded her from recovering against the railroad company.

So, a recovery was denied where a wife was riding in a wagon with her husband, who was driving, knew that the crossing was an unusually dangerous one, but failed to look or listen or warn her husband, the facts showing that if she had looked she could have seen, and would have seen the approaching train.

*Miller v. Louisville, N. A. & C. R. Co.*, 128  
Ind. 97, Am. St. Rep. 416, 27 N. E. 339.

In the above case the engineer thought the husband did not intend to cross, for he stopped the wagon just before the train reached the crossing, but drove on again entering the crossing in time to be struck by the train.

The rule requiring a traveler to look out for trains approaching a crossing is not relaxed, because of the fact that one is being carried in a vehicle owned and driven by another. It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger and avoid it, if practicable.

*Brickell v. New York C. & H. R. Co.*, 120 N. Y. 290, 17 Am. St. Rep. 648, 24 N. E. 449.

So one who hires a team, vehicle, and driver, with whom he takes passage, is bound to check or remonstrate with the driver in case the latter attempts to cross a railroad track without stopping or listening for approaching trains, and no recovery can be had in case he is killed by the driver's attempt to cross heedless of an approaching train, when he is in an open carriage and can readily discover the peril of the driver's act.

*Illinois C. R. Co. v. McLeod*, 78 Miss. 334, 52 L. R. A. 954, 84 Am. St. Rep. 630, 29 S. 76.

So, one who hires a liveryman to drive him to a certain place must, in order to recover for injury by train at a railroad crossing, have exercised ordinary care, and have been free from personal negligence.

*Louisville & N. R. Co. v. Molloy*, 122 Ky. 219, 91 S. W. 685.

So, one riding beside an employed driver in an open buggy hired for the journey has been held guilty of contributory negligence precluding a recovery from the railroad company for injury at a railroad crossing, where, upon nearing the crossing, a train could have been seen for a distance of 1,325 feet, and such person failed to stop, look, or listen.

*Dryden v. Pennsylvania R. Co.*, 211 Pa. 620,  
61 Atl. 249.

So, a passenger in a carryall injured in a collision with a passing train while crossing a railroad track, who is familiar with the location and knows that a train is about due, is guilty of contributory negligence, if he permits himself to be carried upon the track while his fellow passengers in the vehicle are making such a noise by singing and shouting that an approaching train cannot be heard, and he utters no warnings or expostulations, and is favorably situated to alight without danger.

*Koehler v. Rochester & L. O. R. Co.*, 66 Hun.  
566, 21 N. Y. Supp. 844.

In the case of *Withey v. Fowler Co.*, — Iowa—, 145 N. W. 923, where the plaintiff, while a guest in an automobile, was injured by being struck by a truck, the court, concerning the imputation of a driver's negligence in cases of joint enterprise, said:

“It is somewhat difficult to state a comprehensive definition of what constitutes a joint enterprise as applied to this class of cases, but it is perhaps suf-



ficiently accurate for present purposes to say that, to impute a driver's negligence to another occupant of his carriage, the relation between them must be shown to be something more than that of host and guest, and the mere fact that both have engaged in the drive because of the mutual pleasure to be so derived does not materially alter the situation."

In *Beaucage v. Mercer*, 206 Mass. 492, 138 Am. St. Rep. 401, 92 N. E. 774, where two occupants of an automobile were out riding under an agreement to share the expense, and the car became disabled, and one of them telephoned the defendant to tow the car, during the process of which an accident occurred, it was held that, so long as the joint enterprise of the occupants was in force, the contributory negligence of one would bar a recovery by the other, provided the negligence was in a matter within the scope of the joint agreement.

In *Clarke v. Connecticut Co.*, 83 Conn. 219, 76 Atl. 523, it was held that the law fixes no different standard of duty for a gratuitous passenger in an automobile than for the driver, but that each is bound to use reasonable care, taking into consideration all of the circumstances, including the passenger's position. The court in this case said:

"Does the fact that the plaintiff was a gratuitous passenger having no control of the automobile bring her within a different rule (from that applicable to the driver of the automobile)? That fact would have great weight in determining whether her con-

duct constituted due care. It would be one of the circumstances, and unquestionably an important one, to be considered in deciding whether her conduct was all that reasonable care on her part called for. A gratuitous passenger, in no matter what vehicle, is not expected ordinarily to give advice or direction as to its control and management. To do so might be harmful rather than helpful. But his presence in the vehicle may so obstruct the driver's view of a car or other approaching vehicle, or other circumstances of the situation may be such, as to make it his duty to look out for threatened or possible dangers, and to warn the driver of such after their discovery. This might be necessary for the passenger's as well as for the driver's safety. On the other hand, the character of the vehicle in which he is a passenger may be such, that to look or listen for approaching cars or other dangers would be unnecessary and useless. For such a passenger to engage in conversation with fellow passengers, and entirely neglect to look out for dangers, or to observe the manner in which the vehicle is being operated, might be the conduct of a reasonably prudent person. It cannot be said, therefore, that in every case, and all the time, it is the duty of a gratuitous passenger to use his senses or to look and listen in order to discover approaching vehicles or other dangers, or that his failure to do so would be a failure to exercise due care. But while this is so, the law, fixes no different standard of duty for him than for the driver. Each is bound to use reasonable care. What conduct on the passenger's part is necessary to comply with his duty must depend upon all the circumstances, one of which is that he is merely a passenger having no control over the man-

agement of the vehicle in which he is being transported. Manifestly the conduct which reasonable care requires of such a passenger will not ordinarily, if in any case, be the same as that which it would require of the driver. While the standard of duty is the same, the conduct required to fulfill that duty is ordinarily different, because their circumstances are different."

And in that case it was held that if a woman who was injured while riding with her husband in an automobile, could, by the exercise of reasonable care, have seen the car which struck the machine and have warned her husband in time to have avoided the collision, and such failure was the proximate cause of her injury, she could not recover, although she did not in fact see the danger in time to warn her husband.

In *Noakes v. New York C. & H. R. R. Co.*, 121 App. Div. 716, 106 N. Y. Supp. 522, it was assumed that the rule that a traveler approaching a railroad track is bound to use his eyes and ears so far as there is an opportunity and avoid danger, notwithstanding the neglect of the railroad's servants, applies to a passenger in an automobile approaching a railroad, as well as to the persons in charge of the motive power of the vehicle.

A guest or passenger not for hire injured in a collision was held to have been guilty of contributory negligence under the following circumstances:

Where a man guest thirty-six years of age, who was riding on the back seat of an automobile



on the side from which the train which struck the machine approached, it appearing that for a distance of from 175 to 200 feet there was an unobstructed view of 2000 feet of the railroad track; that he was acquainted with the locality; that he was talking with a fellow passenger seated on the opposite side of the machine; that he failed to look or listen for trains, and that the automobile was proceeding slowly and might, at a word of warning have been stopped in time to have avoided the accident.

*Read v. New York C. & H. R. R. Co.*, 123 App. Div. 228, 107 N. Y. Supp. 1068.

This was the same accident involved in *Noakes v. New York C. & H. R. R. Co.*, 121 App. Div. 716, 106 N. Y. Supp. 522, *supra*, in which a sixteen year old girl riding in the automobile was held not to have been guilty of contributory negligence, although the opinion was rendered by a divided court, two out of five justices dissenting.

Where a woman passenger in an automobile of which her husband was in charge made no effort to get out after the machine had become stalled on a street car track on a dark night, notwithstanding that she saw the light of a rapidly approaching car when it was 700 feet away, but merely stood up and signaled the motorman with her hands when the car was about 100 feet away, she having admitted that she could have gotten out, but did not do so



because she thought the motorman would stop. Held, such woman passenger was guilty of contributory negligence, precluding recovery.

*Lawrence v. Fitchburg & L. Street R. Co.*,  
201 Mass. 489, 87 N. E. 898.

Where a woman of mature years injured in a collision between a street car and an automobile which her husband was driving testified that she was familiar with the roads in the vicinity and knew the crossing at which the accident occurred; that one coming down the hill approaching the crossing would see trolley wires at a distance of 400 or 500 feet, and also the top of the trolley pole, but that because of the shrubbery the car itself could not be seen unless one was looking for it; that immediately before the accident she was talking with a guest who was sitting beside her; that they were not particularly looking ahead, but that she depended upon her husband to do that; and that the machine was under control and might have been stopped at a word of caution. Held, her contributory negligence was a bar to recovery.

*Pouch v. Staten Island Midland R. Co.*, 142  
App Div. 16, 126 N. Y. Supp. 738;

From either aspect of the instant case it would seem that the evidence is insufficient to justify the verdict, *i.e.*—whether the negligence of Tucker be imputed to the deceased, or whether the deceased himself was negligent. From either view, the com-

pany should not be held responsible for the accident. Unquestionably, under these authorities, Tucker, the driver of the automobile, was grossly careless. If he had taken any precautions in looking for the approaching train the accident could never have happened. He was in the zone of safety when the train was in plain view for more than 140 feet and was not in the danger zone until he had actually arrived at the main track. At any time during that interval, if he had momentarily glanced up the track, the accident would have been prevented. The same argument would apply to the deceased. His opportunities for observation were equally as good if not better than Mr. Tucker's. If he had taken the slightest care in approaching the crossing, he could have given ample warning to Tucker. There is no evidence that he exercised the slightest precaution. Therefore, whether the deceased be charged with his own negligence, or that of Mr. Tucker, the verdict is equally indefensible.

Beyond all this, the law of the case, as given to the jury, was that the deceased himself was bound to use ordinary care. They also were instructed of what that ordinary care consisted, *i.e.*—that he was to look and listen for an approaching train, and that if he could have seen the train in time to have prevented the accident, and did not do so, that conclusively showed a lack of care on his part.

Taking the uncontradicted facts in this case together with the law of this case, which to that extent was eminently correct, as shown by the fore-

going authorities, the verdict should have been in favor of the defendant company or the motion for non-suit should have been granted. To say that the deceased, in complete possession of his faculties, at nine o'clock in the morning of a bright day with the train in full view for a distance of 145 feet, took the slightest precaution in attempting to cross in front of it, is too severe a test upon human credulity. All human instinct and knowledge are to the contrary. For all purposes, the deceased, as well as Tucker, might as well have been entirely deaf and stone blind, because there is no scintilla of evidence that they took any precaution whatever while they were traversing the full distance of 145 feet or attempting to use the sense of sight or hearing until it was too late. The only conclusion to be reached by the evidence is that the deceased and Mr. Tucker, heedlessly and recklessly drove in front of a rapidly approaching train while it was in plain view. Comment can add nothing to such a state of facts. No logic can find in it or extract from it any manifestation or idea of that reasonable care or common prudence which the circumstances demanded of the deceased and Tucker in approaching the crossing on that fateful day. Without necessity, and of their own accord, the deceased and Tucker moved heedlessly into danger when each was in complete command of his own action. To quote the language of an eminent jurist, in dealing with a case of this character, the deceased and Tucker moved heedlessly and without



necessity into danger "equaling in courage, excelling in composure, the immortal six hundred at Balaklava; but in care and circumspection, rivaling only the commander who ordered that 'rash and fatal charge.' "

The requirements of the law, moreover, proceed beyond the featureless generalities that when one approaches upon a highway where a railroad is to be crossed upon the same level, it is his plain duty to proceed with caution. As we have seen, the law defines precisely what the term "ordinary care under the circumstances" shall mean in this case.

The question of care at a railway crossing, as affecting the traveler, is no longer a question for the jury. The quantum of care is exactly prescribed as a matter of law. If, therefore, the plaintiff, by looking could have seen, or by listening could have heard, the approaching train, in time to escape, it will be conclusively presumed by the collision either that he did not listen or did not look, or, if he did so, that he did not heed what he saw or heard. Such conduct is negligence *per se*.

This case should not have been left to the determination of the jury. The standard fixed by law is one of specific acts rather than the generality that the conduct must be that of the average ideal man. Common experience has become part of the law, and in a case of this character, it is the duty of the Court to declare that the accident must have occurred through the contributory negligence and want of care of the deceased. No other conclusion



can be drawn. All the evidence in the case as to the conduct of the deceased, precludes recovery.

Courts are not so deaf to the voice of nature, or so blind to the law of physics, that every verdict of a jury in derogation of those laws will be treated as a conclusive finding of fact or of any probative value, simply because of its rendition.

### SPECIFICATION OF ERROR NO. 3.

The court erred in giving the instruction quoted under this specification, first, for the reasons given with regard to specification of error number 1, relating to the Selma Ordinance, and second, because the plaintiff in error by the instruction was made responsible for all damages sustained by defendants in error without regard to whether there was or was not any causal connection between the violation of Section 486 of the Civil Code and the happening of the accident, resulting in the damage of which complaint is made; nor is there any qualification to the effect that, *in the absence of contributory negligence*, plaintiff in error would be responsible for an accident occurring by reason of the violation of the section.

*Eaton v. S. P. Co.*, 22 Cal. App. Rep. 473, and cases cited.

This contention is given added weight by the refusal of the court to give the instructions requested by plaintiff in error, as set out in Specifications of Error, Numbers 10, 11 and 12, hereafter referred to.

## SPECIFICATION OF ERROR NO. 4.

This specification may be considered in connection with Number 1, *supra*. It being error to admit in evidence the ordinance in question, it was likewise error for the court to instruct the jury that a violation thereof was presumptive negligence.

## SPECIFICATION OF ERROR NO. 5.

Plaintiff in error further contends that the following instruction under the evidence in this case was erroneous:

"If you find that the automobile truck was operated and driven solely by the witness Tucker, and that the deceased had no control over the operation of the truck, or no right to exercise control over the same, and that he did not exercise any supervision or control over the same, then you are further instructed that in such case the negligence of Tucker (if he was negligent) is not to be imputed to the deceased so as to constitute contributory negligence on his part; but that to sustain the defense of contributory negligence, the defendant must prove or the evidence must show personal failure, on the part of the deceased to exercise ordinary care.

"In other words, if you find that the deceased, Wright, was riding in the automobile truck, driven by the witness Tucker, and that he, Wright, had neither control of nor the right of control, such driver, and that he was not exercising or assuming control over the truck or such driver at the time of the accident, then to sustain the defense of contributory negligence on the part of the deceased,

it must appear from the evidence that he, personally, as distinguished from the driver of the truck, failed to exercise ordinary care at and immediately prior to the time of the accident which caused his death." (Tr. p. 75.)

Our criticism of this instruction is that there is no evidence in the case warranting the instruction; i. e.—that it is based upon a false premise. It proceeds upon the theory that there was evidence justifying the jury to determine that the deceased had no control over the operation of the truck or right to exercise any supervision thereof. On the contrary, the conceded fact is that the truck was being used in a dual capacity—under lease to the deceased and also being demonstrated to him as a possible purchaser. Under all the foregoing authorities, it would seem that under such a state of facts the negligence of Tucker as a matter of law would be imputed to the deceased. Therefore, the instruction was not proper under the special facts in this case.

#### SPECIFICATION OF ERRORS NUMBERS 6, 7, 8, 9 AND 15.

We also contend that the following instructions requested by the plaintiff in error should have been given:

"You are further instructed that the direct and approximate cause of the accident in which George Reuben Wright was killed was the contributory negligence and want of care of the deceased and



the driver of the truck, and your verdict, therefore, will be in favor of the defendant." (Tr. p. 79).

"If you find from the evidence in this case that either the deceased, George Reuben Wright, or the driver of the truck, could have seen the train approaching the crossing at which the accident occurred before they attempted to cross the track upon which the train was approaching, and if the accident occurred as the result of their attempting to cross in front of the approaching train while it was in plain view, then the plaintiffs are not entitled to recover against the defendant and your verdict will be in its favor." (Tr. p. 80).

"You are further instructed that if you believe from the evidence that the direct and proximate cause of the accident was the attempt on the part of George Reuben Wright, deceased, and the driver of the truck, to cross the track in front of the approaching train, or if they had listened they could have heard it in time to have stopped their truck and prevented the accident, then you are instructed that the accident was occasioned by the negligence and want of care of George Reuben Wright and the driver of the truck and that the defendant was not liable, and your verdict accordingly will be in favor of the defendant." (Tr. p. 80).

"You are further instructed that if you believe from the evidence that the approaching train was in plain view of either the deceased or the driver of the truck before they reached the track upon which the accident occurred, and that if either of them had looked he could have seen it before they crossed the track, or if either of them had listened he could have heard the train approaching before they crossed the track, and that if either of them



had looked and listened before attempting to cross the track, he could have seen and heard the approaching train and thus avoided any danger, and that while the train was so approaching in plain view of the deceased and the driver of the truck, they attempted to cross the track in front of the approaching train, and that by reason only of any such attempt the accident occurred resulting in the death of George Reuben Wright, then I instruct you that such conduct on the part of the deceased and the driver of the truck was negligence and the plaintiffs cannot recover." (Tr. p. 87).

"You are further instructed that it was Mr. Wright's duty, in approaching the crossing, equally with Mr. Tucker's, to have looked and listened for the approaching train. If, therefore, you believe from the evidence, that if Mr. Wright had looked or listened at any time before the truck actually reached the track upon which the accident occurred, he could have seen or heard the train in time to have avoided the accident, then your verdict must be in favor of the defendant." (Tr. p. 93).

"You are further instructed that the evidence in this case is not sufficient to justify a verdict in favor of the plaintiffs and you will therefore render a verdict in favor of the defendant." (Tr. p. 94).

All of these instructions are based upon the theory that the accident was occasioned through the contributory negligence and want of care of the deceased and are founded upon the premise which we have already argued at length—that the motion for a non-suit should have been granted, and that the evidence is insufficient to justify the verdict. If

we be correct in our theory of the case, then these instructions should have been given and a verdict rendered in favor of the plaintiff in error.

### SPECIFICATION OF ERRORS NUMBERS 10, 11, 12 AND 13.

We again contend that the Court erred in refusing to give the following instructions requested by the defendant:

"You are further instructed that if you believe from the evidence that the employees of the defendant company failed to give the warning of the approach of the train either by blowing the whistle or ringing the bell, yet, if you further believe that under the instructions herein given you that either the deceased, or the driver of the truck, if he had looked, could have seen, or if he had listened could have heard the approaching train in time to have avoided the accident by the exercise of reasonable care, then the plaintiffs are not entitled to recover." (Tr. p. 88).

"You are further instructed that neither Mr. Wright nor Mr. Tucker has the right to depend upon the custom, or even the duty enjoined by law, of the engineer or fireman to give the customary signals of the approach of the train, as it was their duty, in approaching the crossing, to look and listen, irrespective of such signals. If, therefore, they could have seen or heard the approaching train if they had looked or listened in time to avoid the accident, then your verdict should be in favor of the defendant, even if you further believe that no warning whatever was given of the approaching

train by the employees of the Company.” (Tr. p. 91).

“You are further instructed that if you believe from the evidence that the train was approaching the crossing at an excessive rate of speed and in violation of the ordinance, yet, that fact is immaterial if you further believe that if Mr. Wright or Mr. Tucker had looked towards the approaching train, they could have seen it at any time sufficient to have prevented the accident, then the responsibility of the accident lies with Mr. Tucker and Mr. Wright, and your verdict must be in favor of the defendant.” (Tr. pp. 91 and 92).

“You are further instructed that if you believe from the evidence that the employees of the defendant were negligent, that the train was going at an excessive rate of speed, that the whistle of the engine never blew nor the bell rang, and that no warning of any kind was given to Mr. Tucker or Mr. Wright by the engineer or fireman of the train, yet, if you believe from the evidence that Mr. Wright or Mr. Tucker could have seen or heard the approaching train in time to have avoided the accident, if they had looked or listened, then your verdict must be in favor of the defendant.” (Tr. p. 92).

The jury were not instructed upon any of these matters, so were wholly unadvised upon this important feature of the case. As we have seen, they had already been instructed that a failure to comply with the ordinance of the city of Selma was presumptive negligence, also that the failure to give the warning required by law was presumptive negligence. (Tr. pp. 72-73).



In view of these instructions, we were likewise entitled to have the jury advised upon our theory of the case, i. e., that notwithstanding presumptive negligence on our part, yet, if by taking the precautions required by law in looking and listening, the accident could have been prevented, then the responsibility for the accident rests upon the deceased.

In the case of *Hutson v. So. Calif. Ry. Co.*, 150 Cal., at page 703 (89 Pac. 1093), it is said:

“It is not the law of this State that a person approaching a railroad crossing is authorized to assume that the persons operating a train will not in any way be negligent in that operation. This doctrine has been asserted in some of the States, but it is opposed to the law as laid down in the decisions of this State and of the Supreme Court of the United States. Such a rule would abrogate the doctrine of contributory negligence in all such cases, and in the early case of *Meeks vs. Southern Pacific R. R. Co.*, 52 Cal., 604, this Court said: ‘The 486th section of the Civil Code, providing that a railroad corporation shall be liable for all damages sustained by any person and caused by the locomotive of the corporation when a bell is not sounded or a whistle blown as directed by that section, does not abrogate the doctrine of contributory negligence, or operate to give a right of action where the negligence of the plaintiff \* \* \* materially or proximately contributed to the injury.’ In *Herbert v. Southern Pacific Co.*, 121 Cal. 227 (53 Pac. 651), this precise question was involved, this Court saying: ‘The only answer to this is, that defendants’ employees did



not ring the bell or sound the whistle and that the fireman was not at his place on the left side of the engine. The argument, of course, is that if the signals had been given plaintiff might have heard, and not hearing them, he had the right to assume when he was about to make the crossing that the train had not then reached the whistling post 1,325 feet above, and that the fireman might have seen him in time to have prevented the accident had he been on the lookout. It may be admitted that all this was culpable negligence on the part of defendants' employees. The defense of contributory negligence implies that defendant may have been guilty of such negligence as would justify a recovery by the plaintiff if he were not also in fault. This is no argument, therefore, against the position of the defendant." In *Green v. Southern California Ry. Co.* 138 Cal. 1 (70 Pac. 926) the rule of law laid down in *Herbert v. Southern Pacific Co.* is reaffirmed, the Chief Justice placing his concurring opinion upon this precise ground. The same doctrine is also announced in *Pepper v. Southern Pac. Co.* 105 Cal. 389 (38 Pac. 974) and in *Bilton v. Southern Pac. Co.* 148 Cal. 443 (83 Pac. 440). The rule is simply this: That a railroad crossing, from its very nature, is always a place of danger, and a traveler has no right to omit any of the care which the law demands of him, upon the assumption that due care will be exercised in the operation of the train. Says the circuit court of appeals in *Erie Ry. Co. v. Kane*, 118 Fed. 234, (55 C. C. A. 129): "Again, counsel for the defendant in error urges that it was not negligence for decedent to be there because he was not bound to anticipate Bowker's negligence through which the

collision came about. It is never negligence, they say, for one not to anticipate negligence in anybody else. There is, however, no such general rule of law or prudent conduct. There are instances where as a matter of law it is negligence not to anticipate negligence in others. As, for instance, it is well settled in the Federal courts that it is negligence for a highway traveler not to anticipate failure on the part of an engineer to give appropriate signals of approach of his train to a highway crossing. He has no right not to look or listen because he has heard no such signals." This is in accord with the doctrine of the Supreme Court of the United States, as laid down in *Railroad Co. v. Houston*, 95 U. S. 697, where it is said: "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen or look before attempting to cross the railroad track in order to avoid an approaching train and not to walk carelessly into a place of danger.' "

The doctrine in this case was reaffirmed in the very late case of *Thompson v. Southern Pacific Co.* 23 Cal. App. 488, 161 Pac 16, *supra*.

Speaking on the same question, our Supreme Court, in the case of *Larrabee v. Western Pacific Ry. Co.*, 52 Cal. Dec. 601, 161 Pac. 750, says:

"Nor is it true, as respondent argues, that the deceased's conduct, otherwise clearly negligent, is relieved from this reproach by virtue of his right

to presume that the defendant would not run its train at an excessive rate of speed in approaching this crossing. Nor does the added circumstance that this was a special train in the slightest change the deceased's legal responsibilities. Railroads are entitled to operate special trains and to operate them at high rates of speed. Their regular trains cannot be and no one expects them to be always on schedule. With all this the deceased was of course familiar. The statement in *Strong v. Sacramento & Placerville R. R. Co.*, 61 Cal. 326, and in *Whalen v. Arcata & Mad River R. Co.*, 92 Cal. 669, to the effect that the deceased had the right to rely upon the 'performance by those on the locomotive of every act imposed by law upon them when approaching a crossing,' cannot be considered to be the law of this State as affecting the rights and duties of one about to venture to make a railroad crossing. Such a one is not entitled to rely upon such a performance of duty so as to relieve him from the necessity of looking if he does not hear, and of stopping if he cannot see. Suffice it upon this to cite the later case of *Koch v. Southern Cal. Ry. Co.*, 148 Cal. 680; *Griffith v. San Pedro, L. A. & Salt Lake R. R. Co.*, 170 Cal. 772."

It was argued in the lower court, and we may assume that the same contention will be made here by counsel for defendants in error, that under the evidence, the Court was not justified in granting a non-suit or taking the case away from the consideration of the jury. It will be seen, however, from the number of the foregoing cases decided by our Federal Courts, that they do not hesitate



in a proper case, either to grant a non-suit or give directed verdicts, or reverse cases on appeal where they are satisfied that the evidence is insufficient to justify the verdict.

In *Commissioners, Etc., v. Clark*, 94 U. S. 278, at page 284, 24 L. Ed. 59, Mr. Justice Clifford says:

“Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury, but the modern decisions have established a more reasonable rule, to-wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.”

In *Meguire v. Corwine*, 101 U. S. 108, at page 111, 25 L. Ed. 899, Mr. Justice Swayne says:

“A judge has no right to submit a question where the state of the evidence forbids it.”

And again, in *Bowditch v. Boston*, 101 U. S. 16, at page 18, 25 L. Ed. 980, he says:

“It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such verdict were rendered the other party would be entitled to a new trial, it is the right



and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves \* \* \* expense. It gives scientific certainty to the law in its application to the facts, and promotes the ends of justice. *Merchants' Bank v. State Bank*, 10 Wall. 604, 637 (19 L. Ed. 1008); *Improvement Company v. Munson*, 14 Wall. 442 (20 L. Ed. 867); *Pleasants v. Fant*, 22 Wall 116 (22 L. Ed. 780)."

This proposition is affirmed in *Anderson v. Beal*, 113 U. S. 227, 241, 5 Sup. Ct. 433, 28 L. Ed. 966. *Arthur v. Cumming*, 91 U. S. 362, 365, 23 L. Ed. 438;

In *Delaware, Etc., R. R. Co. v. Converse*, 139 U. S., at page 472, 11 Sup. Ct. at page 570, 35 L. Ed. 213, Mr. Justice Harlan says:

"But it is well settled that the Court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the Court in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. *Phoenix Ins. Co. v. Doster*, 106 U. S. 30, 32 (1 Sup. Ct. 18, 27 L. Ed. 65); *Griggs v. Houston*, 104 U. S. 553 (26 L. Ed. 840); *Randall v. Baltimore & Ohio*, 109 U. S. 478, 482 (3 Sup. Ct. 322, 27 L. Ed. 1003); *Anderson Co. Commissioners v. Beal*, 113 U. S. 227, 241 (5 Sup. Ct. 433, 28 L. Ed. 966); *Schofield v. C. & St. P. Ry. Co.*, 114 U. S. 615, 618, (5 Sup. Ct. 1125, 29 L. Ed. 224). 'It would be an idle proceeding' this

Court said in *North Penn. Railroad v. Commercial Bank*, 123 U. S. 727, 733 (8 Sup. Ct. 266, 31 L. Ed. 287), 'to submit the evidence to the jury when they could justly find only in one way.'

In *Patton v. Texas & Pacific Ry. Co.*, 179 U. S., at page 660, 21 Sup. Ct. at page 276, 45 L. Ed. 361, Mr. Justice Brewer, quoting this last passage, states, "that cases are not to be lightly taken from the jury" but adds:

"At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands chargeable with full responsibility."

There has been no modification of these principles in the recent cases.

*District of Columbia v. Moulton*, 182 U. S.

576, 582, 21 Sup. Ct. 840, 45 L. Ed. 1237;

*McGuire v. Blount*, 199 U. S. 142, 148, 26

Sup. Ct. 1, 50 L. Ed. 125.

*Empire State Cattle Co. v. Atchison Ry. Co.*,

210 U. S. 1, 10, 28 Sup. Ct. 607, 52 L. Ed.

931, 15 Ann. Cas. 70;

*Hepner v. United States*, 213 U. S. 103, 112,

53 L. Ed. 720, 27 L. R. A. (N. S.) 739,

16 Ann. Cas. 960.

In this last case the Supreme Court applies the rule in an action brought by the Government to enforce a statutory penalty and sustained a directed

verdict for the plaintiff. The application of this rule to negligence cases has been many times reiterated.

*Patton v. T. & P. Ry. Co.*, 179 U. S. 658,  
659, 21 Supt. Ct. 275, 45 L. Ed. 361;  
*Southern Pacific Co. v. Pool*, 160 U. S. 438,  
440, 16 Sup. Ct. 338, 339, 40 L. Ed. 485.

In the Estate of Baldwin, 162 Cal. 473, the rule is laid down as follows:

“The conditions under which the course pursued by the Court in this instance is held to be proper are defined by a series of uniform decisions of this Court, to which it will be sufficient to make reference. The doctrine of scintilla of evidence is rejected, as it is by the courts of the United States. (*Commissioners of Marion Co. v. Clark*, 94 U. S. 278, 24 L. Ed. 59.) A directed verdict is proper, unless there be substantial evidence tending to prove in favor of plaintiff all the controverted facts necessary to establish his case. In other words, a directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence. To warrant a Court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence, but, to deprive the Court of the right to exercise this power, if there be a conflict, it must be a substantial one. To the support of these incontrovertible declarations of the law, we need do no more than cite *Lacey v. Porter*, 103 Cal. 597, 37 Pac. 635; *Davis v. California St. R. R. Co.*, 105 Cal. 131; 38 Pac. 647; *O'Connor v. Witherby*, 111 Cal. 523, 44 Pac. 227; *Los Angeles, Etc., Co. v.*

*Thompson*, 117 Cal. 594, 49 Pac. 714; *White v. Warren*, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723; *Estate of Morey*, 147 Cal. 495, 82 Pac. 57; *Estate of Chevallier*, 159 Cal. 161, 113 Pac. 130."

The question was very fully considered by our Supreme Court in the *Matter of the Estate of Caspar, deceased*, 172 Cal. Reports 147. In that case the Court states that for a detailed discussion of the proposition reference may be made to *McDonald v. Metropolitan Street Ry. Co.*, 167 N. Y. 66.

It, therefore, seems to be quite clear that in the instant case the Court should either have granted the motion for a non-suit or directed the jury to return a verdict for the plaintiff in error, and not having done so, the judgment should be reversed.

Respectfully submitted,

L. L. CORY,

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*Attorneys for Plaintiff in Error.*





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No. 2942

IN THE  
United States  
Circuit Court of Appeals  
FOR THE NINTH CIRCUIT

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SOUTHERN PACIFIC COMPANY,

(a corporation),

Plaintiff in Error,

vs.

GERTRUDE WRIGHT and ORENE  
WRIGHT and ORA WRIGHT, by  
GERTRUDE WRIGHT, their Guardian  
*ad Litem*,

Defendants in Error.

Filed

MAY 7 - 1917

F. D. Monckton  
clerk

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Points and Authorities on Behalf of Defendants in Error

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FRANK KAUKA,

Attorney for Defendants in Error

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POINTS AND AUTHORITIES ON BEHALF OF  
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STATEMENT OF CASE.

In accordance with the rule of this Court, we deem it proper to make only such addition to the statement of facts presented in the brief of plaintiff in error, as will, together with that statement, make a complete and fair statement of the facts of the case.

The train that collided with the truck was a regular



passenger train of the company, was on time, and immediately prior to the accident and up to the time of the accident was running within the corporate limits of the City of Selma at a rate of about 42 miles per hour. An ordinance of the City provided that the rate of speed should not exceed eight miles per hour. The point from which the truck started southerly was east of the railroad track at what is known as the oil tanks, same being about 1400 feet north of the railroad crossing where the collision occurred. The driveway along which the truck passed from the oil tanks to the crossing on which the collision occurred is about 60 feet east of the main track of the railroad and turns on a curve into Arrants Street, which is the crossing street on which the collision occurred. The curve commences (measuring along the driveway) at about 145 feet from the main track of the railroad where the collision occurred. Arrants Street crosses the railroad tracks at nearly a right angle, and extends westerly from the railroad track to the roadway known as West Front Street in the City of Selma, and also extends easterly from the railroad tracks through that part of the City. The street or driveway down which the truck pursued its course, prior to the attempted crossing of the railroad track, is East Front Street, and it extends onward, parallel with the railroad, through that part of the City of Selma. There is maintained on the railroad right of way, a packing house, which abuts on the south line of Arrants Street, and the loading platform of the packing house is probably six feet wide, and is on a line with and adjacent to the side of cars standing upon the first track for purposes

of loading. In approaching the crossing in question from the course taken by the truck, it is necessary for the driver of a truck, or any other vehicle crossing that way, to observe the approach of vehicles which may be coming from the east on Arrants Street, and also from the south on East Front Street, so as to avoid collision with any such vehicles so approaching the same point of crossing. The packing house on the railroad right-of-way obscures the view to the south of both the main and the side tracks of the railroad, and a view in that direction cannot be had by a person passing onto the railroad crossing in question until the vision of the driver has cleared the side of the packing house adjacent to the railroad tracks. Mr. Tucker, the driver of the truck, at the curve of East Front Street into Arrants Street, preparatory to making the railroad crossing, and at about 140 or 145 feet from the main track of the railroad, looked up the track in a northerly direction, where he had a clear view to a point further than the oil tanks. Thus, he had a clear view of the track northwesterly for at least 1600 feet from the crossing where the collision occurred. There was no train on that section of the track at that time. So at the time of the looking by both Tucker and Wright there was no train within 1600 feet of the crossing where the collision occurred, and there was no noise of any approaching train. Neither Mr. Tucker nor the deceased knew that any train was approaching at any point, and both knew that no train approaching from the northwest was within 1600 feet of the crossing at the time that they, in the motor truck were 145 feet from the main track of such crossing. The

train that did collide with the truck came from somewhere up the railroad track, with the steam shut off, and without ringing a bell, or sounding a whistle, and making no noise except the rumble of the wheels that attends the movement of the train when "drifting in." At the curve, after observing the track clear for 1600 feet to the north, Mr. Tucker gave his attention to the approach from the east on Arrants Street, and to the approach from the south on East Front Street into Arrants Street, and then to listening and looking for any train or locomotive or moving car that might be approaching the crossing, either upon the side tracks or the main track, from the south. Then as soon as his attention could be taken from the danger of trains coming from the south, he saw the train coming from the north at a point 300 or 400 feet from the crossing. This was at the instant that the front wheels of the truck were going upon the main track of the railroad at the crossing. On seeing the train he accelerated the speed of the truck in an attempt to clear the train, which was coming at a terrific rate of speed, but the train collided with the rear wheel of the truck, and caused the truck to be wrecked, the driver Tucker, to be seriously injured and Wright killed.

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#### ARGUMENT.

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In this case there arise the following questions:

1. Was the driver of the truck, Mr. Fred Tucker, negligent in approaching the crossing where the collision

occurred, under the circumstances then existing, and with only the precautions taken by Tucker in so attempting said crossing?

2. Did the relation of master and servant exist between the deceased Wright, and the driver of the truck, Tucker, the former being the master, and the latter the servant?

3. If Wright was not the master of the driver of the truck, does the evidence show such negligence on the part of Wright, the deceased, as to prevent a recovery for his death?

Plaintiff in error, in its brief has undertaken to answer all of these questions in the affirmative, and therefore concludes that in any event the defendants in error in this action were not entitled to recover any damages from the plaintiff in error.

It would seem from the argument of counsel, and from the authorities cited, that plaintiff in error relies most strongly upon the proposition that the relation of master and servant did exist between the deceased as master, and the driver of the truck as servant. Mr. Tucker, the only witness who testified upon this point, stated:

“I had full charge of the operating of the truck.  
 \* \* \* \* Mr. Wright had been riding with me on  
 this truck during that morning up to the time of the  
 accident. \* \* \* Q. Did Mr. Wright have any-  
 thing to do with the operating of the machine? A.  
 None whatever. Q. Did he assume, in other words,



did he give you any directions or instructions or say anything to you as to how it should be operated? A No, sir. (Tr. fol. 36-37). In a way I was fulfilling two things, demonstrating the truck to Mr. Wright and also doing some work for him. He was paying for the use of the truck, renting it. I was driving the truck for Mr. Phelan; I had charge of it, was the driver to go with it, and Mr. Wright was paying the rental for it. (Tr. fol. 43). \* \* \* Mr. Phelan said he would rent Mr. Wright the truck for \$15 a day providing I would drive it, but he would not rent it to him, let him drive it, because he did not know him and did not know whether he knew how to drive it or not, and he knew that I knew how to drive it. He said that. I was working for him. I had worked for Mr. Phelan before that. Mr. Phelan only said it was all right over the phone, providing I would drive it. I had no arrangement with Mr. Wright about employing me. He was to get the truck for \$15 a day." (Tr. fol. 46).

It will thus be seen that the evidence clearly shows that this truck was the property of J. C. Phelan; that the driver of the truck, Mr. Tucker, was designated by J. C. Phelan to drive the truck in transferring the freight for Mr. Wright, the deceased, and that the deceased had hired the truck with the driver from Mr. Phelan for that purpose. This evidence likewise shows, together with other evidence to the same point, that the driver of the truck was an experienced driver, and knew how to

handle the truck. Wright had nothing whatever to do with the management or control of the truck, and did not either manage or control, or undertake to manage or control same. Therefore, there was no relation of master and servant between the driver of the truck and the deceased. There was no identity of the driver and the deceased with reference to the management or control or mechanical operation of the truck. It is well settled law that where there is not this relation between the driver of a vehicle and a passenger being carried by the vehicle, the negligence, if any, of the driver is not imputable to the passenger.

The case of *Little vs. Hackett*, 116 U. S. 366, was one where a man hired a coach and driver to drive the hirer to a railroad station, and on arriving at the railroad station discovered that he had time to visit a park, and therefore directed the driver of the coach to drive through the park, and in going to the park the driver crossed a railroad track, and through the combined negligence of the employees of the railroad and the driver of the coach, there was a collision which resulted in injury to the passenger. The court left the question of the relation of the driver and the passenger to the jury, and on that point charged the jury as follows:

“I charge you that where a person hires a public hack or a carriage which at the time is in the care of the driver, for the purpose of temporary conveyance, and gives directions to the driver as to the place or places to which he desires to be conveyed,

and gives him no special directions as to his mode or manner of driving, he is not responsible for the acts or negligence of the driver; and if he sustains an injury by means of a collision between his carriage and another, he may recover damages from any party by whose fault or negligence the injury occurred, whether that of the driver of the carriage, in which he is riding or of the driver of the other. He may sue either. The negligence of the driver of the carriage in which he is riding will not prevent him from recovering damages against the other driver, if he was negligent at the same time."

"The passenger in the carriage may direct the driver where to go, to such a park or to such a place that he wishes to see; so far the driver is under his direction; but my charge to you is that as to the manner of driving, the driver of the carriage, or the owner of the hack, (in other words, he who has charge of it, and has charge of the team.) is the person responsible for the manner of driving; and the passenger is not responsible for that, unless he interferes and controls the matter by his own commands or requirements. If the passenger requires the driver to drive with great speed through a crowded street, and an injury should occur to foot passengers, or to anybody else, why then he might be liable, because it was by his own command and direction that it was done; but ordinarily in a public hack, the passengers do not control the driver,

and therefore I hold that unless you believe Mr. Hackett exercised control over the driver in this case, he is not liable for what the driver did. If you believe he did exercise control and required the driver to cross at this particular time, then he would be liable because of his interference.”

The Supreme Court of the United States in a very carefully considered opinion, held this instruction to be the law, and after reviewing the cases, stated:

“In this case it was left to the jury to say whether the plaintiff had exercised any control over the conduct of the driver, further than to indicate the places to which he wished him to drive. *The instruction of the court below*, that unless he did exercise such control and required the driver to cross the track at the time the collision occurred, the negligence of the driver was not imputable to him so as to bar his right of action against the defendant, *was therefore correct, and the judgment must be affirmed, and it is so ordered.* (Italics ours).

In this case at page 377, it is held by the court that the relation of master and servant must exist between the passenger and driver to the extent that the passenger controls or has the right to control the conduct of the driver, before any negligence of the driver may be imputed to the passenger. The Supreme Court in this action after reviewing the authorities, approved the doctrine that the principle involved is the same whether



the passenger is a passenger upon a steam or electric railroad or an omnibus or vehicle of any kind, or whether he be a passenger for hire or a passenger for accommodation upon the invitation of the owner or driver of the omnibus, vehicle or other conveyance (378).

The foregoing case is cited and followed in many cases, but we deem it sufficient to cite:

Evans v. Lake Erie Etc., Railroad Company,

78 Federal, 782.

Kowalski v. Chicago G. W. Ry. Co.,

84 Federal, 586.

Thompson v. Los Angeles Etc., Ry. Co.,

165 Cal. 748.

Tousley v. Pacific Electric Ry. Co.,

166 Cal. 458.

Fujise v. Los Angeles Ry. Co.,

12 Cal. App. R. 207.

Bryant v. Pacific Electric Railway Company,

53 Cal. Decisions, 459.

In the case last cited, it appeared that the plaintiff was riding home with his son in an automobile, which automobile was owned by a close corporation, consisting of the father, mother and son, who lived together, and that the machine was used by the corporation for the purpose of making collections of furniture to be upholstered, and then redelivered to the owners. The machine was kept in a garage at the home of the father and the son. At the time of the accident, it being in

the evening, the son was driving the machine (as was his custom) for the purpose of first making a delivery and then proceeding on from the place of delivery to the home of the father and son. It appeared that the accident that resulted in the injury to the father was attributable to the negligence of the railway company and of the son. The trial court determined upon the trial that as a matter of law, the negligence of the son, if any, was imputable to the father under the circumstances of that case, but upon a motion for new trial, the court re-considered its action, and holding its former instruction as error, granted a new trial. From that order, the defendant appealed. The Supreme Court of California held:

“A guest or passenger in a vehicle driven or operated by another is not, ordinarily, bound by the negligence of the driver or operator. (*Parmenter v. McDougall*, 172 Cal. 306.)”

Upon the question of joint or common enterprise the court quotes from *Ruling Case Law* as follows:

“There seems to be no difference of opinion as to the rule that when two persons are engaged in a joint enterprise in the use of an automobile, the contributory negligence of one will bar a recovery by either, if it is in a matter within the scope of the joint undertaking.” (*Vol. 2, p. 1208, Sec. 43.*)

But the court states:

“But in order that there be such a joint under-

taking, it is not sufficient merely that the passenger or occupant of the machine indicate to the driver or chauffeur the route he may wish to travel, or the place to which he wishes to go, even though in this respect, there exists between them a common enterprise of riding together. The circumstances must be such as to show that the occupant and the driver together had such control and direction over the automobile as to be practically in the joint or common possession of it."

Again quoting:

"Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the *object or purposes* of the undertaking, and an equal right to direct and govern the *movements and conduct of each other with respect thereto*. Each must have some voice and right to be heard in its control and management." (St. Louis Etc. Ry. Co. v. Bell, 159 Pac. (Okl.) 336; Atwood v. Utah Light Etc. Ry. Co., 140 Pac. (Utah) 137; Cotton v. Willmar Etc. Ry. Co., 109 N. W. (Minn.) 835.).

The court further stated:

"It may be conceded that the plaintiff and his son were jointly interested in the conduct of the business of the corporation. But it does not necessarily follow that they possessed a joint or com-

community interest *in the matter of driving the automobile.*

The case at bar would seem to be a clearer case of no community interest in the operation of the automobile, than the case last cited. In that case the Supreme Court of California held that the relation of the parties was a proper matter to be submitted to the jury. In the case at bar, the evidence clearly shows not only that the deceased did not exercise any control over the driving or operation of the truck, but that the very terms upon which the automobile was rented precluded the deceased from having anything whatsoever to do with the mechanical operation or driving of the truck.

The authorities cited in counsel's brief, upon the question of negligence, seem to be intended by counsel to be directed indiscriminately to the question of the negligence of the driver, the imputability of the negligence of the driver, if any, to the deceased, and the independent negligence of the deceased, if any.

Negligence is defined to be:

"The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do; moreover it is not absolute or intrinsic, but always relative to some circumstance of time, place or person." (Broom's Legal Maxims, 329; *Richardson v. Kier*, 34 Cal. 75.)



“The fact of negligence is generally an inference from many facts and circumstances, all of which it is the province of the jury to find. It can very seldom happen that the question is so clear from doubt that the court can undertake to say, as matter of law, that the jury could not fairly and honestly find for the plaintiff. It is not the duty of the court in such cases, any more than in any other, to usurp the province of the jury and pass upon the facts. And the nonsuit should only be granted in such cases where the evidence of the misconduct on the part of the injured party is so clear and irresistible as to put the case on a par with those cases where a nonsuit is granted for a failure to introduce evidence sufficient to go to the jury upon some point essential to the plaintiff’s case. The fact must be so clear that, *looking upon the plaintiff’s case in the most favorable light, and giving him the benefit of all controverted questions*, the court can see that a verdict in his favor must necessarily be set aside.” (Schierhold v. N. B. & M. R. R. Co. 40 Cal. 447.)

Jamison v. San Jose & Santa Clara Railroad Co.,

55 Cal. 593, 596.

Baltimore Ete. R. R. Co.,

95 U. S. 439.

29 Cyc. 416-418.

King v. City of Cleveland,

28 Fed. 835, 837.

“All of the surrounding circumstances must be

taken into account if the question involved is one of negligence, such as the opportunity for deliberation, degree of danger and many other considerations.”

## 21 Cyc. 418.

Taking the view most favorable to the defendant in error, of the evidence in this case, the facts are these:

When the driver of the truck in question was at a point not to exceed 145 feet from the main track which he desired to cross he observed the track to the north, from which direction the train actually came, and found that for a distance of 1600 feet from the crossing of the main track there was no train. His hearing was good, and he listened and heard no train coming at any point. The driver and the deceased therefore did not know that any train was at any place approaching the crossing in question, but did know that no train was approaching that crossing from that direction within a distance of 1600 feet, all of which was within the city limits. There was East Front Street from the south, and Arrants Street from the east to be observed by the driver in order to avoid any collision with vehicles approaching from those directions. The view of the track of the railroad company to the south was obstructed by a building maintained on the street line of Arrants Street at the south, same being on the right of way of the railway company. It was necessary for the driver to guard against approaching trains, or switching trains, from that direction. He was traveling at the rate of 4 miles

an hour from that point to the crossing, and therefore would clear the crossing in less than 26 seconds from the time he observed the track and found it clear for a distance of 1600 feet. In order to reach the crossing in time to run down the truck, it was necessary for the train to travel over a space of 1600 feet in less than 26 seconds, or at a rate of speed exceeding 42 miles an hour. It is true that other witnesses, one of them almost directly in front of the train, and 200 feet or more south of the crossing, upon a mere estimate, stated that the train was going "about 30 miles an hour," but as Mr. Tucker was the driver of the truck, and acquainted with the speed of the machine, and measured the distance, his testimony must be taken as the facts established in the case. If those facts be, and it is apparent that they are, the most favorable view of the evidence to the defendant in error, then the facts established are that the train that destroyed the life of Wright, and wrecked the truck, and injured the driver, Mr. Tucker, was traveling at a rate of speed exceeding 42 miles an hour. It had evidently come within the city limits at a speed greatly in excess of 42 miles an hour, and had for the purpose of effecting a stop at the railroad station, three blocks beyond the crossing where the collision occurred, shut off the steam and permitted the momentum of the train to drive it on at this reckless rate of speed, without sounding the whistle, or ringing the bell. We believe that it cannot be said as a matter of law that the action of the driver was negligence, and indeed it seems to us that as a matter of fact under the circumstances here the driver of the truck

himself exercised that due care and caution for his own safety and the safety of his passenger that the ordinary prudent man would exercise under like circumstances. It will be kept in mind that the railroad train was being operated within a city. That the railroad company had itself created an obstruction to the view beyond the crossing to the south, and that that obstruction, required the close and careful attention of any and all persons approaching that crossing and going westerly so as not to be driven upon by a locomotive or train coming from the south after they were actually upon the track. It will be remembered that the circumstances and conditions surrounding this crossing are such that the legislative body of the City of Selma had made it unlawful to operate or propel a train at that place in excess of a speed of eight miles per hour. We do not contend that the mere fact that the law of the city was being violated by the excessive rate of speed of the train would excuse the contributory negligence of the driver of this truck, if such contributory negligence appeared, but we do contend that an ordinary prudent man would not only have a right to assume, but would ordinarily assume that no train would be operated at that place and under those circumstances at such a reckless rate of speed as 42 miles or even 30 miles per hour. If the train had been operated at 12 or 15, or possibly 20 miles per hour, a reasonable man might have expected the same, but to say that any reasonable man would expect a heavy train to be permitted to go recklessly through a part of a city, (where there were numerous crossings being used by the public), without



ringing a bell or sounding a whistle, and the steam shut off so that the train made practically no noise, would, as it seems to us, be equivalent to saying that reasonable men must believe that operators of railroad trains are not only persistently and wantonly negligent, but that they are so wantonly and wilfully negligent as to be in such cases criminals. This a reasonable man cannot be expected to assume or believe. It would seem therefore that the question of exactly where and when the driver of this truck should have observed the track of the railroad from whence the train came, was a question proper to be submitted to the jury if that question had been an issue at all in this case.

A careful review of the authorities, upon the question of negligence of the driver of this truck, cited by plaintiff in error discloses that in those cases, we believe with one exception, the view of the railroad track was obstructed at some point near the railroad track, so that the person approaching the track could not until within a certain distance of the track see whether or not there was a train approaching. It is unquestionably the law that a railroad track is a sign of danger, and that any person intending to go upon the track or cross it must so regard it and must therefore take that reasonable precaution that a reasonable and prudent minded man would take *under the existing circumstances*. There was no obstruction in the case at bar to the vision of the occupants of the truck to the north, for 1600 feet. This circumstance is not found, neither is it considered in any case cited by counsel.

The case of *Brommer v. Penn. R. Co.*, 179 *Fed.* 577 is a case in which the driver of the automobile at a point 170 feet from the track could have had, if he had looked, a clear view of the railroad track in the direction from which the train came, for a distance of 1400 feet. Judging from the speed at which he was driving he evidently did not *look* at the point where he had an unobstructed vision of 1400 feet of the track, because the facts disclose that the train was actually at that time within that view. After that the track was obstructed until he arrived at a point within 30 or 40 feet of the track, and drove upon the track without then looking or listening for a train. This the court in that case held to be contributory negligence; and it should be remarked at this point that the court in that case did not hold that the man who was in the front seat with the driver, and who did not look either at the 170 foot point, or after the obstructions were past, should not recover in the case because the *negligence of the driver* was imputed to that person, but did hold that such conduct on the part of that person at that time and place was independent negligence of that person himself, and for that reason he could not recover.

In the case of *Northern Pac. Ry. Co. v. Tripp*, 220 *Fed.* 286, cited by counsel, the injured person was driving at a slow rate of speed, and saw the track 800 feet at a point 116 feet from the track, and then drove on, passing an intervening obstruction to his view, without again looking, and the court held there that he was guilty of contributory negligence as a matter of law.

In the case of *Rebillard v. Minneapolis, St. P. & S. S. M. Ry. Co.* 216 Fed. 503, cited by counsel, it appears that the injured party was riding at night time in an automobile with the driver of the machine without any lights, and that the passenger knew that there were no lights, and therefore knew the danger of driving the machine in any place under those circumstances; and the fact that he submitted himself to the dangers incident to such recklessness, of course absolved the railroad company from the payment of any damages resulting from the machine being driven *without lights at night* into an excavation by the side of the railroad left open by the railroad company.

In the case of *Erie R. Co. v. Hurlburt*, 221 Fed 907, (and this is the one case that we referred to in the opening of this part of the argument as the exception to the general trend of cases cited by counsel) it appears that a man was driving a horse and buggy, carrying his wife as a passenger, and that when he approached the railroad crossing at a point 15 feet from the track he stopped and looked in the direction from which the train came, and that from that point the occupants of the buggy had a clear vision of the track for 1500 feet to a point where the coming train would emerge from a deep cut. The evidence of the wife was that they both looked at that point, and that no train was within that vision, and that they proceeded on to the track and that just as they went upon the track she looked through an opening in the buggy curtain, and had the same vision of the track, *and saw no train, be-*

*cause no train was there.* The court did not hold that to look at that place or any other place, or not to look at that place, or any other place, was contributory negligence, but did hold that as a matter of physical fact, *the train was there*, and did collide with the buggy, and that the statement of the witness that she looked at the very instant that the train collided with the buggy, *and no train was there*, could not in the face of the physical facts be regarded as any evidence at all. Needless to say, this case is not in point in any respect with the case at bar.

In the case of *Herbert v. Southern Pacific Company*, 121 Cal., 227, cited by counsel, the driver of the vehicle passed a siding at Penryn, and proceeded onward to the point of crossing where the collision occurred. When he passed Penryn a freight train was standing on the side track, and he knew that it was awaiting the passing of a passenger train coming in the opposite direction, and would then proceed in the same direction that he was traveling. It was 2980 feet from the siding to the crossing at which the collision occurred. The whistling post of the crossing in question was 1320 feet from the crossing. The driver of the vehicle proceeded at the rate of about 7 miles an hour, and when he was more than 1000 feet from the crossing he heard the "toot" of the freight train, and then knew that the freight train at that time had left the siding, and was proceeding onward to the same crossing where he attempted to cross the track. Thus, the train had less than three times as far to travel to reach the crossing



as he, the driver of the vehicle had. When at a point 450 feet from the crossing he assumed that the freight train had not yet reached the whistling post, because he did not hear it whistle. He rounded a hill, and without again looking or listening, drove on to the track, and was injured by the train. He slackened his speed, and drove less than 7 miles an hour to the point of collision. The court held that as a matter of law, he, knowing that the train was coming, and that it was less than 2980 feet from the crossing when he was more than 1000 feet from the crossing, had no right to assume that the operators of the train would whistle at the whistling post, and that to proceed under circumstances of that kind, with full knowledge of all of the facts, was contributory negligence on his part, and prevented any recovery for that reason.

In the case of *Holmes vs. S. P. Coast Ry. Co.*, 97 Cal. 161, cited by counsel, the evidence shows that the plaintiff placed himself in a situation of danger at a time when he was waiting for a train that he was expecting to arrive; that he walked back and forth on a narrow walk adjacent to the railroad track without observing whether or not a train was approaching, and that just before the accident he turned his back upon the train and walked from the direction from which the train should arrive; that upon the hearing of the sound of the train, and being thus still in the place of danger, he stepped upon the track. It was of course held that he was guilty of such negligence as would prevent a recovery.

In the case of *Pepper vs. S. P. Co.*, 105 *Cal.*, 389, cited by counsel, the evidence showed that the plaintiff did not at any time look to see whether a train was or was not approaching, that the rate of speed of the train at that particular place was not a material matter, and under those circumstances it appeared from the evidence without conflict that the plaintiff took no precaution whatever.

In the case of *Studer v. S. P. Co.*, 121 *Cal.* 400, cited by counsel, the evidence showed that the train that caused the injury was standing across the roadway crossing, and had been standing there for some time, and the injured person, a boy twelve years of age, undertook to cross the track between two of the cars of the train.

In the case of *Green vs. S. P. Co.*, 132 *Cal.* 254, cited by counsel, it appeared that the plaintiff could by looking before attempting the crossing have had a clear view of the railroad track on which the train approached for a distance of 2000 feet, and that he neither looked nor listened, and that his failure to take any precaution whatever was such negligence on his part as would prevent a recovery.

In *Green vs. Southern Cal. Ry. Co.*, 138 *Cal.* 1, cited by counsel, the evidence showed that Mrs. Green, and her mother, Mrs. Warren, were driving out of the city of San Bernardino on "C" Street, near some foundry buildings, which buildings are on a piece of land en-

closed by a picket fence. For a large part of the journey along "C" Street, the railroad could not be seen on account of natural and artificial obstructions, except that at a point extending from 110 to 138 feet from the railroad crossing of the defendant the railroad could be seen, in the direction from which the train arrived, for some distance beyond a point 333 feet from the crossing, and from the 110 foot point, the railroad track was obscured until they reached a point 33 feet from the crossing, and from that point, by looking through the picket fence standing there, the track could be seen for a distance of 333 feet. From a point 25 feet from the center of the track there was an unobstructed view of the track for 1000 feet.

"The women did not look over or through the picket fence; they did not look to the east when they came to the line of the right of way: they did not stop to listen: they drove right along without looking to the east or stopping to listen, until the horse was within a few feet of the track: and then, seeing the train nearly upon them, the horse was whipped and made to cross immediately in front of the locomotive, which struck the wagon, and caused the damage. The horse was *trotting* along "C" Street; but Mrs. Warren testified that it had slowed to a walk before they had reached the right of way."

Upon this state of facts of course it was held that inasmuch as the occupants of the buggy had a clear view

of the track for a distance of 28 feet to a point where they could determine whether a train was approaching on the track more than 333 feet from the crossing, *and did not look*, and that the horse was walking when coming to a point 33 feet from the crossing where they had a clear view of 333 feet of the track that was obscured at the other point of view, *and they did not there look*, the occupants of the buggy took no precaution whatever for their own safety, and therefore were guilty of such negligence as to prevent a recovery.

Thus it will be seen that the cases relied upon by counsel as showing the negligence of the driver of the truck in the case at bar, and as counsel would contend, showing the negligence of the passenger in the truck, the deceased, for whose death this action is brought, are not by any means parallel cases, as to facts, with the case at bar. In the case at bar, both the driver of the truck and the deceased looked at a time and place when and where they had a clear view of the railroad track for 1600 feet, and from whence it would take them only 26 seconds to cross the track. It is not a case in which the train was there, and therefore in which the physical fact refutes the statement of the witness. There was in fact no train on that track at that time within 1600 feet of the fatal crossing.

It is only in those cases in which the facts are such that all reasonable minded men must agree that the act of the party in question was an act of negligence, that the court should take from the jury, the question



of whether or not the particular act or acts constituted negligence.

“It has often been said by this court that it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a general rule, it is a question of fact for the jury, an inference to be deducted from the circumstances of each particular case, and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. This is true even where there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn therefrom. If the conceded facts are such that reasonable minds might differ upon the question as to whether or not one was negligent, the question is one of fact for the jury. These rules are so well settled as to render it unnecessary to here do more than state them. (See *Herbert v. Southern Pacific Co.*, 121 Cal. 227; *Fox vs. Oakland Consolidated St. Ry. Co.*, 118 Cal. 61; *McKune v. Santa Clara Valley M. & L. Co.*, 110 Cal. 484. *Seller v. Market St. Ry. Co.*, 139 Cal. 268.”

As the Supreme Court of the United States has said:

“On the other hand there is some testimony to show that the plaintiff ran carelessly through the

depot; that he knew that the train was approaching, and that he might have guarded himself against it if he had stopped at the exit of the depot long enough to have looked about him. But we think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide the disputed questions of fact, why it should not decide such questions as these as well as others. There is nothing in a case in which it is conceded fully and unreservedly that the defendant company is in fault on account of the manner of running its train, such as the high rate of speed, and other careless matters mentioned by the court in its instruction, which should justify the court in refusing to submit to the jury the question whether the defendant Company is relieved from the liability incurred by it, by reason of the acts of the plaintiff, showing that, in some degree, he may not have been as careful as the most cautious and prudent man would have been. Instead of the course here pursued a due regard for the respective functions of the court and the jury would seem to demand that these questions should have been submitted to the jury, accompanied by such instructions from the presiding judge as would have secured a sound verdict."

The same doctrine is announced in *Cain vs. N. C. R. R. Co.*, 128 U. S. 91, and *Dunlap vs. Annie R. R. Co.*, 130 U. S. 649.

It will be observed that the case at bar comes directly within the principle announced in the *Jones* case, cited above. In that case the court held that especially for the reason that the negligence of the defendant railway company was clearly established, and in fact conceded, the question of the contributory negligence of the injured person should be submitted to the jury. In the case at bar, the undisputed evidence is, and therefore it must be taken as conceded by the plaintiff in error the railroad company was negligent in every respect in which negligence could be attributed to the operators of a railroad train. The whistle was not sounded; the bell did not ring; the noise of the train was subdued by shutting off the steam; the train within the confines of a city traveled at the tremendous rate of more than 42 miles per hour while approaching the particular crossing in question, and the other street crossings of the city. Moreover any slight application of the brakes at a time when the engineer and fireman must have seen the truck making the crossing, would have prevented the accident. If the *Jones* case was one in which the wanton negligence of the defendant justified the submission of the question of the contributory negligence of the plaintiff to the jury, then much more is the case at bar one in which not only justice but the rigid rules of the law itself demand

that the question of contributory negligence should be determined by the jury.

“Where the testimony is conflicting, or for any cause there is a reasonable doubt as to the facts, or as to the inference to be drawn from them, negligence is a question for the jury. This rule will not be affected by the fact that plaintiff was the only witness in his behalf;” 28 Cyc. 632.

In the case of *Grand Trunk Ry. Co. vs. Ives*, 144 U. S. 408, the Supreme Court of the United States said:

“As the question of negligence on the part of the defendant was one of fact for the jury to determine, under all the circumstances of the case, and under proper instructions from the court, so also the question of whether there was negligence in the deceased which was the proximate cause of the injury, was likewise a question of fact for the jury to determine, under like rules. The determination of what was such contributory negligence on the part of the deceased as would defeat this action, or perhaps, more accurately speaking, the question of whether the deceased, at the time of the fatal accident, was, under all the circumstances of the case, in the exercise of such due care and diligence as would be expected of a reasonably prudent and careful person, under similar circumstances, was no more a question of law for the court than was the question of negligence on the part of the de-



fendant. There is no more of an absolute standard of ordinary care and diligence in the one instance than in the other.”

The court also set forth the facts of a Massachusetts case and as same are particularly applicable to the case at bar we quote from the decision as follows:

“The recent case of *Sullivan v. New York N. H. & H. R. Co.* from Massachusetts is published in 28 N. E., 911, is so similar to the one at bar on this question, that it deserves more than a passing notice. The substance of the case is stated in the syllabus by the reporter as follows: ‘Plaintiff, a woman about sixty-five years of age, of ordinary intelligence and possessed of good sight and hearing, was injured at a railroad crossing. The railroad had been raised several feet higher than the side walk, and the work of grading was still unfinished, and the crossing in a broken condition. There were three tracks, and a train was approaching on the middle one. The view was obstructed somewhat with buildings, but after reaching the first track it was clear. The evidence showed that the plaintiff was familiar with the passing of trains; that she did not look before going upon the track; and that, if she had looked, she could have seen the train a quarter of a mile. When the whistle sounded she looked directly at the train and hurried to get across. Plaintiff testified that she looked before going upon the track.

but did not see the train or hear the whistle; that the only warning she had was the noise of its approach after she was on the first track; and that she did not then look to see where it was or on which track it was coming, but started to cross as fast as possible, and in so doing stumbled and fell between the rails. The signals required by the statute were not given; held, that it did not appear as matter of law that plaintiff was guilty of gross or wilful negligence, and that it was proper to submit the question to the jury.' See also *Evans v. Lake Shore and M. S. R. Co.* 14 L. R. A. 223; *Ellis v. Lake Shore & M. S. R. Co.*, 138 Pac. 506; *Brown v. Texas and P. R. Co.* 42 La. Ann. 350; *Heddles v. Chicago & N. W. R. Co.* 77 Wis. 228; *Parsons v. New York Cen. & H. R. R. Co.* 113 N. Y. 355, 3 L. R. A. 683; *Cooper v. Lake Shore & M. S. R. Co.* 66 Mich. 261."

Then the court continued:

"Nothing was said by this court in *Chicago R. I. & P. Co. v. Houston*, 95 U. S. 697, or in *Schofeld vs. Chicago M. & S. T. P. R. Co.* 114 U. S. 615, which are relied upon by the defendant that in anywise conflict with the instruction of the court below in this case or lays down any different doctrine with respect to contributory negligence. (*Delaware L. & W. R. Co. v. Converse*, 139 U. S. 469). Nor do the Michigan authorities, which are relied on, when read in the light of the particular

facts and circumstances of each separate case enunciate a different doctrine; but so far as applicable they tend to sustain the instructions objected to."

In that case the defendant requested the following instruction:

"If you find that the deceased might have stopped at a point fifteen or eighteen feet from the railroad crossing, and there had an unobstructed view of defendant's track either way; that he failed so to stop; that instead the deceased drove upon the defendant's track, watching the Bay City Train, that had already passed, and, with his back turned in the direction of the approaching train, the deceased was guilty of contributing to the injury, and your verdict must be for the defendant, although you are also satisfied that the defendant was guilty of negligence in the running of the train in the particulars mentioned in the declaration."

The Supreme Court of the United States in passing upon the proposed instruction said:

"The reason given by the court for refusing this request was that 'it is too much upon the weight of the evidence and confines the jury to the particular circumstance narrated without notice of others that they might think important.' This reason is a sound one. In determining whether the deceased was guilty of contributory negligence, the jury

were bound to consider *all* the facts and circumstances bearing upon the question, and not select one particular prominent fact or circumstance as controlling the case, to the exclusion of all others.”

144 U. S. Reports, pg. 434.

It would appear quite clear from the foregoing authorities that the answer to the first question propounded in this brief is, that the question of the negligence of said Tucker, the driver of the truck, was properly submitted to the jury, and that the answer to the second question is that the relation of master and servant did not exist between the deceased, Wright, and the driver of the truck, Mr. Tucker, and that there was no identity of those persons in the matter of the operation and control of the truck, but that Mr. Tucker the driver had the sole and exclusive charge of the truck and of its management and control, and that the deceased, Wright, did not have the right to exercise any control over the operation or management of the truck, or over the driver thereof, and that he did not exercise nor attempt to exercise any management or control over either the one or the other, and that upon any view of the matter of the relation of the driver, Tucker, to the deceased, Wright, the case was properly submitted to the jury.

It necessarily follows that if the defendant in error was not entitled to recover from the plaintiff in error in this action, it was because that the conduct of the



deceased Wright at the time and place of the accident was such as to establish, as a matter of law, that the deceased, Wright, himself, was negligent, and that his negligence was the proximate cause of the injury.

The deceased Wright was riding in the front seat of the truck and the truck was in control of the driver. The evidence shows that Tucker was a competent and experienced operator and demonstrator of auto vehicles, including the truck in question.

Mr. Wright knew nothing about the truck, nor of its management or control. At a point not to exceed 145 feet from the railroad track crossing in question, Mr. Wright looked up the track for a distance of 1600 feet. While the evidence, of course, does not show and cannot show by positive statement of witnesses, whether or not Mr. Wright saw any train, the evidence of Tucker does show that no train was within that vision at that time. Therefore the evidence must be taken to positively and clearly establish the fact that at the time that the deceased Wright looked in a northerly direction, there was no train within 1600 feet of the railroad crossing. The truck was traveling at a rate of from four to six miles per hour. Wright had confided his safety and security to the driver of the truck, and as a reasonable minded man, he had a right to believe that under the surrounding circumstances, no train would come within the 1600 foot section of the track and pass over it in time to collide with the truck before it had made the crossing. At

the time of looking up the track he saw and knew that he was in no danger whatever. If there was a point at which Wright could determine that he was in danger, it must have been after the train was so far advanced within the 1600 feet section of the track that it would appear to an ordinary and prudent man that it would probably collide with the truck, if the truck proceeded.

Suppose, for the sake of the argument, that he did, at the time that the truck was 100 feet from the track, see or know that the train was approaching, being almost directly in front of the train he could not determine the speed at which the train was coming. This is more particularly the case because the train was "drifting in" with the steam shut off, and was being propelled by the momentum theretofore gathered. He might have seen the train and very prudently determined in his own mind that there was no danger of a collision for two reasons: First, because the train did not appear to him to be coming at such a rate of speed as to **overtake and run down the truck** upon the tracks; and second, that the automobile truck was in the hands of a competent and safe driver, who would control it so as to prevent any injury and who would stop if necessary at the proper point to avoid a collision unless he, the driver, should become confused by some words or acts on the part of Wright at that time.

It may be contended however, that if he saw the train coming within the 1600 foot section of the track heretofore mentioned, and saw that Tucker did not stop before or at the instant that the front end of the truck came

near the main track of the railroad on which the train was running, he should have himself jumped from the truck. To jump from a moving truck at any time or any place is a dangerous feat, but more especially would it have been dangerous at this point where, when he could have first apprehended any danger, to jump would be to jump upon the exposed track of the railroad, in the direction from which the train was approaching. It would seem that his failure therefore to jump from the truck could not be said as a matter of law to constitute negligence on his part. On the contrary it would seem that to have taken those chances under the circumstances there present, would have been not only an act of negligence, but almost an act of madness. It will be remembered in this connection that the train struck the rear wheel of the truck, showing that it was a matter of only a fraction of a second that was required to permit that truck to have passed safely over the track, and that if at any time, even 100 feet from the point of collision, the engineer had applied his brakes to the train that was drifting on its own momentum, the accident would have been avoided.

As suggested in the case of *Jones v. East Tennessee Ry. Co.*, hereinabove cited, the fact that all of the evidence shows, and of course it is therefore conceded, that the operators of the train were negligent in every respect in which operators of trains may be negligent, it would be imperative that the alleged contributory negligence of either Wright or Tucker, and especially Wright, was a matter properly to be submitted to the

jury. In this case it was submitted to the jury and the jury determined that there was no negligence of Wright that contributed proximately to the injury. The train did not sound the whistle; its bell did not ring, and it rushed onward through the city, reckless of the lives of persons in the proper use of the highways crossing the track in that city. All of the evidence so shows it must be conceded, that the plaintiff in error was in every respect negligent.

Upon the authorities cited heretofore, and especially upon the authority of *Jones v. East Tennessee Ry. Co.* the question of the negligence of the deceased was a proper question for the jury, and it would have been error for the court to have taken that question from the jury.

In this contention we are not unmindful of the fact that the general rule of negligence applicable to Tucker, the driver of the truck, is applicable to Wright, the deceased. This does not mean however, that the same acts or omissions as would constitute negligence on the part of Tucker, would constitute negligence on the part of Wright. It simply means that the general rule that the doing of anything that a reasonably prudent minded man would not do under all of the circumstances of the case or the omission to do what a reasonable or prudent man would have done under all of the circumstances of the case, applies to the passenger Wright, as it applies to the driver, Tucker. But what a reasonable and prudent man would do as driver of the motor



vehicle might not be, and indeed we think in most cases could not be what a reasonable and prudent minded man would do as a passenger in the vehicle who had confided his safety and security to the experience and care of the driver. Therefore, while we contend, upon the authorities, that the question, (if it had been a question in this case) of the negligence of Tucker, would have been a proper one for the jury, we contend also that under the relation existing between Tucker, the driver, and Wright, the deceased, there was no question to be determined as to the alleged negligence of Tucker, but that the only question was as to the alleged negligence of Wright, the deceased. And under all the circumstances of this case we contend that the most that the plaintiff in error was entitled to was to have the question of Wright's negligence submitted to the jury.

The plaintiff in error in its brief contends that the admission into evidence of Section 17, of Ordinance No. 51 of the City of Selma was error, and assign as the reason for that contention that the evidence conclusively showed that the violation, if there were any, of the ordinance in question neither proximately nor remotely contributed to the collision. This contention of course cannot be properly made in this court for the reason that while the objection to the introduction of the evidence was upon the general grounds that it was irrelevant, incompetent and immaterial, that objection was qualified or made specific, and the only reasons relied upon by the counsel for its irrelevancy, incompetency and immateriality was that it was "not shown to have been

adopted in any manner at any meeting of said City Trustees, or published as required by law, or duly authenticated in anyway." Of course this objection is limited to the specific grounds stated, and the ordinance was not objectionable upon that ground for the reason that the Statute of the State of California provides that the ordinance as it appears in the ordinance book of the City is *prima facie* evidence of its existence, contents and effects:

"Said record copy, with said certificate, shall be *prima facie* evidence of the contents of the ordinance and of the passage and publication of the same, and shall be admissible as such evidence in any court or proceeding."

Municipal Corporations Act of the State of California, Section 878.

Hennings General Laws of California, page 908.

18 Encyc. of Ev. 818.

Independent v. Trouvalle, 15 Kan. 70.

Rockville v. Merchant, 60 Mo. 365.

Metropolitan St. R. Co. v. Johnson, 76 S. E. 49.

Barber Asphalt Paving Co., v. Jurgens, 170 Cal. 273.

Wagner v. United Railroads, 19 Cal App. R. 396.

The only objection therefore, to the introduction of that provision of the laws of the City of Selma was properly overruled, and we think it cannot now be contended that the objection made at that time shall

have any broader application than the specified grounds of the objection. However that may be, it is quite clear that the objection now contended for, if it had been properly made on the trial of the case is not a valid objection. We may state that it is clear from all of the evidence in this case that if the train had not been operated at a rate of speed very greatly in excess of the speed permitted by the ordinance, there could have been no collision between the train and the automobile and therefore there was a very direct and proximate relation of the violation of this ordinance to the death of Wright, and a casual connection between the collision and the failure to observe the ordinance.

The case of *Davis v. California, etc.*, 105 Cal. 131, cited by counsel in support of this contention states:

“Even if it be conceded that the ordinance required the defendant to keep a lighted lantern at the rail, the only object of the requirement was to enable persons using the walk to see the rail, and if this purpose was served by the gas light, it was sufficient. It is not contended that the rail could not be seen, nor that the lanterns had been kept there until the night of the accident, and then were omitted, leading plaintiff to believe the rail had been removed.”

Clearly the object of the requirement of the ordinance in question was to make the speed of trains at such reasonable rate as would permit the usual and ordinary

use of the streets of Selma, and the violation of that ordinance was the proximate cause of the injury, because if the train had been approaching at the rate of eight miles an hour, and had been within 800 feet for instance, of the crossing at the time the truck was 140 feet from the crossing, the truck could safely have passed over the track and gone far on its way before the train reached the crossing.

In the case of *McCune v. Santa Clara, etc.*, 110 Cal. 480, cited on this point by counsel, Mr. Justice Henshaw says:

“But the principle has this very obvious limitation: The act or omission must have contributed directly to the injury, or, however improper or illegal it may have been in the abstract, no action for damages can be founded upon it. The failure of a locomotive engineer to sound his bell or whistle before crossing a highway would be essentially negligent, *but a totally deaf traveler* upon the highway, could have in no way suffered from the omission, and, as to him it would not be negligence. So, too, the requirement of a night light to warn the public of a temporary obstruction upon a street would not advantage a man absolutely blind, and the failure to maintain it would not, as to him, be negligence.”

And then the distinguished Justice proceeds to say that in the case then under discussion there was no such exceptional facts present, and approved the instruction given by the trial court, which was as follows:



“The failure to comply with a municipal ordinance, or to perform a duty which is imposed by a municipal ordinance, is negligence in itself. Therefore, if you find that the defendant, at the time of the alleged accident, was obstructing the said Fourth Street in the manner alleged, in violation of an ordinance of the City of San Jose, that in itself establishes the negligence upon the part of the defendant, and it is not necessary that the plaintiffs make any further showing of negligence in defendant in order to recover.”

Clearly upon the authorities cited by counsel, the contention of the plaintiff in error upon this point is without merit.

But in view of the possibility of counsel on the oral argument raising the point that the ordinance had not been pleaded, we here state as was said by the Supreme Court of California in *Craig v. Los Angeles Trust Company*, 154 Cal. 669: “The cause of action here alleged was not a violation of the ordinance, but the negligence of the defendant, and the ordinance was simple evidence offered to show such negligence. Under our system of pleading, it is both unnecessary and improper to plead the evidence relied on to establish the ultimate facts essential to a cause of action.”

*Connell v. Harris*, 23 Cal. App. R. 537, 540.

*Scharpf v. Union Oil Co.* 19 Cal. App. R. 100.

Referring to the point made on page 102 of the brief

of plaintiff in error relative to an instruction on the matter of the ordinance, we cite the case of *Stein v. United Railroads*, 159 Cal. 368, holding that the giving of such instruction was proper, or more correctly speaking, that the failure to give same constituted error.

Counsel is also in error at that part of the brief where it is said "nor is there any qualification to the effect that, in the absence of contributory negligence, plaintiff in error would be responsible for an accident occurring by reason of the violation of the section." for the court (Tr. fol. 67) merely stated in effect that the failure of the plaintiff in error to comply with the ordinance (if it did so fail) constituted presumptive negligence; and thereupon the court in the next paragraph admonished the jury that before the plaintiff could recover it must appear from the evidence that the accident resulting in the death of George R. Wright was caused by the negligence of the defendant, unmixed with any negligence of the deceased.

The court in this case, at the request of the defendant, gave the following instruction:

"You are further instructed that there is no evidence before this jury that either the fireman or engineer had any actual knowledge or notice that either Mr. Tucker or Mr. Wright were crossing or attempting to cross the railroad track in front of the approaching train, and this jury can draw no inference of negligence on the part of the defend-

ant because of the fact that the fireman or engineer might have known of the danger in which Mr. Tucker and Mr. Wright were placed. In other words, the last chance doctrine, so-called, has no application to the facts of this case, and you are to

determine this case solely under the instructions given you by the Court.”

This instruction took from the jury the question of whether or not, after the operators of the train saw, or could by the exercise of reasonable diligence have seen, the danger in which the deceased was placed, the accident could have been averted by the operators of the train; and if this instruction was correct, then what is known as the doctrine of last chance of course was not in the case, and it was not for the jury to consider whether or not the accident, after the danger was apparent, and after the operators of the train knew or should have known of the danger, could have been averted by the exercise of due care. But if it was proper for the jury to consider this question, then the instruction was erroneous, and even though disregarded by the jury the verdict should stand. The rule now is,—

“That while the jury should conform to the instructions of the court upon matters of law, if it appears to the appellate tribunal that an instruc-

tion was erroneous, it will not disregard a verdict contrary to such erroneous instruction.”

O’Neal v. Thomas Day Co.

152 Cal. 357.

Tousley v. Pacific Electric Railroad Co.

166 Cal. 462.

The matter under discussion is what is known as the doctrine of last chance. In many jurisdictions it has been held that before the doctrine of last chance can be applied it must be established by evidence that the defendant actually knew of the existing danger to the plaintiff, and with that actual knowledge of the danger failed or omitted to do something that would have prevented the injury, but there are numerous authorities which hold that where the omission of the plaintiff to act with proper caution after the apparent danger of the defendant was either known, *or by the exercise of proper care should have been known to the plaintiff*, the omission to so act with due care and the omission to use the ordinary care by which the danger would have been known is negligence on the part of the plaintiff and is the proximate cause of the injury.

“It is not necessary that the defendant should actually *know* of the danger to which the plaintiff is exposed. It is enough if in discharge of a duty owing the plaintiff he could, by the exercise of ordinary care, have discovered at any time by the use of the agencies at hand to have avoided the



injury. The most reckless persistence on the part of one exposed to danger will not justify another in consciously refraining from using care to avoid injury to him."

Sherman & Redfield on Negligence,  
Vol. 1, Sec. 99.

Citing many other cases, among which is Grand  
Trunk Railroad Co. v. Ives, 144 U. S. 408.

Inland etc., Coasting Co. v. Tolson,  
139 U. S. 551.

In *Bourrett vs. Chicago & N. W. Ry. Co.*, 121 N. W. (Iowa) 380, 384, it is said: "It is manifest that whether actual knowledge of plaintiff's peril is essential, depends upon the nature of the duty due plaintiff. If he is merely a trespasser, or for some other reason the duty of observing him does not devolve on defendant, then evidently no obligation arises on defendant's part until his peril is actually discovered. But the rule is otherwise where a duty is imposed to exercise reasonable care to ascertain the danger, and ample means to do so are available. Thus persons who travel over a highway or street crossing or at places the public generally is licensed to pass are not trespassers and are where they have the right to be, and the railroad company owes them the active duty of keeping a lookout for them."

In the case just cited, there is a very full discussion of this matter, and it is there held that where there is

no duty imposed upon the defendant to watch and to know, it is not of course negligence not to watch and know, but in the case at bar it is plainly the rule that it is the business of the operators of a train on a railway to be vigilant, and to know at all times whether or not either life or property is exposed to danger upon the track ahead of the trains.

Grand Trunk Railroad Co. v. Ives,  
144 U. S. 408.

Denver Etc. Ry. Co. v. Buffehr,  
69 Pac. 582 (Colorado).

Cincinnati H. & D. R. Co. v. Kassen,  
31 N. E. 282 (Ohio).

Richmond Traction Co. v. Martin,  
45 S. E. 886. (Virginia).

Gunther v. St. Louis Etc. Ry. Co.,  
18 S. W. 846 (Missouri).

This doctrine is called the humanitarian doctrine and it is said:

“The humanitarian doctrine takes the imperiled person where it finds him, and makes one liable for injuring him, where he saw, or by ordinary care might have seen his peril in time by the use of the means at hand to avoid injuring him.”

Sherman & Redfield on Negligence,  
Note. Section 99, page 254.

This doctrine is also laid down in Thompson on

Negligence, Sections 239, and in White's Supplement to Thompson on Negligence, Section 239, with many cases there cited.

It is quite apparent from the foregoing authorities that it is the duty of those in control of a train upon a railway track to keep a vigilant look-out for any obstruction upon the track to avoid injury to the property of the railway Company and to passengers and crew on board the train, and to avoid injury to the property of others that might by accident or inadvertence, or neglect be upon the the track, and for the protection of human life in the event that any person or persons might venture upon the track ahead of the train.

This would be of course the emphatic duty of the persons in control of a train in all places and under the circumstances surrounding the accident upon which the case at bar is based. There can be no question either upon ordinary common sense or upon authority that it was the legal and moral duty of the operators of the train to take extraordinary care and precaution for the safety of human lives while propelling the train through the city and crossing the public highways of the city at the time and place that this accident occurred.

It would seem therefore that it was the duty of the trainmen to know who or what was upon the track before them or what person or persons were approaching the track in such proximity to the track ahead of the train as to endanger their lives. This being the duty of the

operators of the train, the authorities above cited would hold that whether or not the evidence established that they did actually see the dangerous position in which the occupants of the truck were placed, they are charged by the law and by the mandates of humanity with the same duty or responsibility as if they had discharged their proper and necessary duty of looking ahead upon the track.

There can be no doubt that this train was three hundred feet from the crossing and from the point of collision when the truck had approached and was going upon the main track of the railroad. While the engineer may not be required to observe that which is not on or about to go upon the track, certainly the presumption is that he does see what is on the track ahead of his engine; and therefore when the engineer saw the dangerous position of the deceased and the driver of the truck, he could, by applying the brakes of the train, have avoided the accident, though unable at that time to bring the train to a full stop. The train drifting in, propelled by its own momentum and not by steam, could have been checked sufficiently by the application of the brakes so that it would not have reached the crossing until the truck had crossed the track. If that application of the brakes had been made even at a distance of 100 feet from the point of collision, the accident would not have occurred, as a half second more time would have been sufficient for the truck to have passed the track in safety.

The exceptions of plaintiff in error numbered from



12 to 35, relate to instructions offered by the plaintiff in error and refused by the court.

We deem it proper to call the attention of the court very briefly to these exceptions for the purpose of showing that it was not error to refuse the instructions:

No. 12. This instruction was given by the court verbatim, except the last clause therein:

“No recovery can be had against the railroad company for such an accident.”

And instead of that clause the court used the concluding expression: “He is guilty of contributory negligence.” Inasmuch as the court had instructed the jury that the plaintiff could not recover unless the accident resulted from the negligence of the defendant unmixed with any negligence of the deceased, (Tr. Fol. 67) it was not error to refuse the instruction, as it was substantially given and fully covered by the instructions of the court.

No. 13. Was an instruction taking from the jury the question of contributory negligence of Wright, and Tucker as well, and taking also from the jury the question of the imputability of any negligence of the driver to Wright, which, upon the authorities herein cited would have been error.

No 14. Was an instruction taking from the jury, the

question of the imputability of the negligence of the driver of the truck to Wright, and was clearly wrong.

No. 15. Was an instruction taking from the jury the question of contributory negligence entirely, as well as the question of the imputability of the negligence of the driver of the truck and was therefore wrong.

No. 16 was an instruction that would take from the jury the question of imputability of negligence, and so far as it was the law was covered by instructions given by the court. (Tr. Folio 68).

No. 17 was an instruction that would take from the jury the question of the relation of the deceased to the driver and was therefore wrong.

No. 18 was fully covered by instructions given by the court. (Tr. Folio 70).

No. 19 was fully covered by instructions given by the court. (Tr. Folio 65).

No. 20 was an instruction that would take from the jury the question of the relation of the deceased to the driver of the truck, and was fully covered as to the deceased by instructions given by the court. (Tr. Folio 67).

No. 21 was an instruction taking from the jury the question of the relationship of the driver of the truck and the deceased, and the imputability of negligence, and

so far as it applied to the negligence of Wright, the deceased, was fully covered by instructions given by the court. (Tr. Folio 67).

No. 22 was an instruction taking the question of the relation of the driver and the deceased, and the imputability of negligence from the jury, and so far as it related to obstructed view was not based upon any evidence in the case, and so far as the law was concerned as to the negligence of the deceased, was fully covered by instructions given by the court. (Tr. Folio 67 and 68).

No 25 was an instruction taking from the jury the question of contributory negligence in its entirety, and was based upon no evidence in the case, and took from the jury the question of the relation of the deceased to the driver of the truck.

No. 24 was an instruction fully covered by instructions given by the court. (Tr. Folio 67).

No. 25 takes the question of contributory negligence from the jury and includes the negligence of the driver as imputable to the deceased.

No. 26 was fully covered by instructions given by the court. (Tr. Folio 70).

No. 27 took from the jury the question of the relation of the driver of the truck to the deceased, and the question of imputability of negligence of the driver to the deceased.

No. 28 was fully covered by instructions given by the court. (Tr. Folio 65, 70).

No. 29 was an instruction fully covered by instructions given by the court. (Tr. Folio 65).

No. 30 was an instruction taking from the jury the question of the relation of the deceased to the driver of the truck, and also of the imputability of the negligence of the driver, if any, to the deceased, and was fully covered so far as it was the law by instructions given by the court. (Tr. Folio 68).

No. 31 was an instruction taking from the jury the question of the relation of the deceased to the driver of the truck, and the question of the imputability of the negligence of the driver of the truck to the deceased.

No. 32 was an instruction which takes from the jury the question of the relation of the deceased to the driver of the truck, and of the imputability of negligence in the case.

No. 33 was objectionable upon the same grounds as No. 32, but so far as it was the law was fully covered by instructions given by the court. (Tr. Folio 68 and 69).

No. 34 was an instruction taking from the jury the question of contributory negligence in its entirety, and taking from the jury the question of the relation of the driver of the truck to the deceased, and was wrong.



No. 35 was an instruction taking from the jury all questions in the case, and was not law.

In this case a motion for a new trial was made in the District Court by the plaintiff in error. After argument thereon the motion was submitted, and after having duly considered the same, the learned Judge who tried the case announced the court's decision and the oral opinion then rendered was taken down and thereafter transcribed by the court reporter. That opinion covers certain phases of the case so clearly and concisely that counsel for defendant in error desire to adopt same as a part of the argument in this brief, and therefore set forth said opinion as follows:

“This is a motion for a new trial based upon a bill of exceptions. Judgment was rendered in the case in favor of the plaintiffs and against the defendant. The action is brought by the widow and children of Mr. Wright who was killed by reason of the fact that the train of the defendant struck an automobile truck in which the deceased was riding, when the truck was crossing the tracks of defendant on a street in the town of Selma.

The facts, briefly stated, so far as it is necessary for me to state them, concerning the motion for a new trial, are these:

Wright and a man named Tucker were in the truck. Tucker was driving it. The truck was rent-

ed to Wright by the owner on condition that Tucker would drive it. Tucker claimed to have complete control of the truck. The truck came down along the side of the track and turned to cross the track on a street crossing. Where they turned to the right it was 145 feet from the railroad track upon which the train was operated. At the time they so turned Tucker looked up the track to see if there was any train coming. He says that Wright also looked. He could see up the track approximately 1500 feet and no train was in sight. The truck proceeded to cross the track and no further endeavor was made by Tucker or Wright to see whether or not a train was coming from that direction. It may be that Wright knew that the train was coming, but there is no direct evidence to that effect. The evidence shows that the train came down the track, some 1500 feet, without blowing a whistle or ringing a bell. All of this distance was in the town of Selma. No signal whatever was given, and the train was run so it made no noise that would attract attention. The truck got pretty nearly across the track when the engine struck the rear end of it and the train was stopped so that the last car stood across the crossing. Wright was instantly killed. While this train was running this distance, approximately 1500 feet, and making no noise, the truck was in plain view of the engineer and fireman on the locomotive, if they were looking. There is no direct evidence that the engineer or fireman saw this truck. From the circumstances, however, the jury might be justified

in believing that there was an engineer and fireman on the engine, and that they were performing their duties; that they saw these men in the truck; saw that they were not looking in the direction of the train, and saw that they were constantly placing themselves in greater jeopardy. If the engineer had held the train and made it two seconds slower the accident would have been avoided.

The complaint simply alleges that Wright was killed by reason of the negligence of the defendant. The answer denies this and sets up contributory negligence in Wright and Tucker. Under the practice in California this answer of contributory negligence stands denied. Under that denial the plaintiff has a right to prove any matter that would meet the issue of contributory negligence.

The defendant introduced no evidence, but the Court, at the request of the defendant instructed the jury that the doctrine of last clear chance did not apply. The jury were not instructed concerning what the law was in regard to the doctrine of last clear chance, but instead thereof the jury were, in effect, given an instructed verdict as to that issue.

The defendant argues that the instruction of the Court settled the law of the case; that the jury was bound by the instructions of the court, and that this court must now grant a new trial if the jury disregarded the instructions. The conclusion

from this argument is that two errors will make a right. This contention of the defendant is not the law in California as appears in the case of *Tousley vs. Pacific Electric Railway Company*, 166 Cal. 457, 462, and it appears that it is not the law in the Federal Courts, *Grand Trunk Railway Company vs. Ives*, 144 U. S., 408, 431.

The rule of law in the United States Courts concerning the doctrine of last clear chance is set forth in an instruction given by the Supreme Court in *Island & Seaboard Navigation Company vs. Tolson*, 139 U. S., 551, 558, as follows:

‘There is another qualification of this rule of negligence, which it is proper I should mention. Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident; yet the contributory negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff’s negligence.’

It was objected that in that case the instruction was wrong because there was no evidence that the defendant knew the peril of the plaintiff. The of-



ficers in charge of the steamer in that case knew simply where the plaintiff stood, but it does not appear that they knew he was in any peril.

This rule of the last clear chance is contrary to the way the common law rule is interpreted by the Supreme Court of the State of California, but this court is not bound by the decisions of the Supreme Court of the State of California in interpreting the doctrine of the common law. The case last above cited is also cited and relied upon in *Kloekenbrink vs. St. Louis, Etc.*, 172 Mo. 788; 72 S. W., 903, and other cases as appears by the notes to the decision. I call attention here to the case of *Grand Trunk Railway Company vs. Ives*, *Supra*, in this connection. In that case the essential facts, in so far as it may be necessary to consider them for the purpose of applying the principal of the last clear chance doctrine, cannot be distinguished from the facts in the case at bar. In that case the people approached and went upon the track looking the other way from the direction from which the train which killed them approached. They were undoubtedly guilty of contributory negligence if the rule applies that a person must look when approaching a railroad track, especially where they are perfectly familiar with the existence of the track. These people did not look. The Court instructed the jury that if they were guilty of contributory negligence they could not recover, but the jury returned a verdict in their favor, notwithstanding the instruction.

The Supreme Court upheld the verdict. What is the difference between that case and this?

It seems, also, to the Court, that other instructions given concerning contributory negligence, which took from the jury certain phases of contributory negligence, were in violation of the rule concerning contributory negligence as laid down by the Supreme Court of the United States.

The defendant in this case, it seems to me, has had a fair trial. If there was any excuse for the gross, almost inhuman, negligence shown by this evidence, it seems to me that it was the duty of the defendant to present the evidence to the jury.

The motion for a new trial will be denied."

We respectfully submit that the judgment and order, appealed from herein, should be affirmed.

FRANK KAUKÉ,  
Attorney for Defendants in Error.



IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, a corporation,

*Plaintiff in Error,*

vs.

GERTRUDE WRIGHT and ORENE WRIGHT  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, their Guardian *ad Litem*,

*Defendants in Error.*

No. 2942.

## PETITION FOR REHEARING

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Filed this.....day of March, 1918.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.





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**PETITION FOR REHEARING**

The Southern Pacific Company, plaintiff in error, prays for a rehearing in this case, upon the ground that the majority opinion of this Court is in error in holding that the question as to whether the deceased, George R. Wright, was guilty of such contributory negligence as to preclude a recovery by his heirs was a question of fact for the jury.

The salient facts are not in dispute. The deceased was in the drayage business at the town of Salem, and apparently both for the purpose of trying out

an auto truck with a view to its purchase, and to make certain transfers, he applied to the owner, Phelan, for the use of the truck in question. Phelan assented, upon the condition that one Tucker, an experienced chauffeur, should drive the truck and "demonstrate" it, and that Wright should pay for its use at the rate of \$15.00 per day. With this understanding, the truck was put into service on May 22d, and at about nine o'clock in the morning Tucker, with the deceased sitting in the seat, on the right side, drove the truck southerly for about a quarter of a mile along a road running parallel with the railroad track, and then turned to make the crossing. The passenger train from the north was about due, and as he turned he looked in that direction but could see no train, although the track was plainly exposed to view for approximately 1500 feet. Up to this time his speed had been about six miles an hour, but as he made the turn, a distance of about 145 feet from the main track, he slowed down to three or four miles, and, proceeding at that speed, and looking down the track to the south for trains from that direction, he passed over the first and second tracks, and was just about to go upon the main track, when, again looking to the north, he saw the passenger train somewhere between two and four hundred feet away, coming rapidly. He made an effort to increase his speed, but not soon enough, for the engine struck the rear end of the truck, overturning it, and injuring him and killing Wright.

No evidence was introduced by the railroad company and it may therefore be assumed that the evidence introduced by plaintiff justifies the claim that the train was running at a speed of between thirty and forty miles per hour, without bell or whistle, in violation of an ordinance limiting the speed to eight miles an hour, and requiring the sounding of a bell or the blowing of a whistle.

It is quite true, as stated in the majority opinion of this Court, that "it is a matter of common experience that passengers in a vehicle trust to the driver to avoid the ordinary dangers of the road". It may also be true that generally it is the wisest course, if not the duty of the passenger to sit still and say nothing; that any other course is fraught with danger, and that "in the long run the greater safety lies in letting the driver alone." It may also be freely conceded that "interference by laying hold of an operating lever or by exclamation or even by direction or inquiry is generally to be deprecated." With these general observations of the Court we have no quarrel.

Upon the other hand, it is also true that if one wilfully or negligently permits another to place him in a place of danger without protest or warning, or permits another to place them both in a situation of danger, he is equally responsible for the consequences. It is in fact as much the duty of the pas-



senger to warn the driver of an approaching danger which the driver may not perceive as it is the duty of the driver to avoid such danger when it has been discovered. If the danger is one which is apparent to the passenger, and there is nothing in the circumstances that would make a word of warning inadvisable, every moral consideration as well as sound law would require the passenger to warn the driver, unless the passenger is assured that the driver is already aware of the danger. Unless he has such assurance the passenger should speak. He cannot blindly assume that the driver has the knowledge that he, the passenger, possesses. In such circumstances the passenger is as much the keeper of the driver's safety as he is of his own. The man who would permit another to unconsciously walk or ride in front of an approaching train without warning, when he was in a position to give such warning, would be culpable in the extreme, regardless of his relations to the one in jeopardy.

It will be observed that we have said it is the duty of the passenger to speak "when there is nothing in the circumstances that would make a word of warning inadvisable." There are instances where words of warning by the passenger might be inadvisable. Upon the crowded public highways where conditions change with bewildering rapidity, and the attention of the driver is absorbed by varying conditions requiring instant decision and action, it is doubtless true, as stated in the opinion of the Court, that gen-

erally it is the wisest course, if not the duty of the passenger, to sit still and say nothing; that any other course is fraught with danger and that "in the long run the greater safety lies in letting the driver alone." Likewise emergencies may confront the driver in other circumstances when his attention should not be distracted by warning or advice from his passenger.

Such conditions did not, however, exist in the case at bar. Wright sat in the same seat with the driver. As is pointed out in the dissenting opinion, Wright was on the right side of the seat of the driver and had a better view than the driver. If Wright had turned his eyes in the direction from which the train was coming, he could have seen it and could have warned Tucker, the driver, that it was coming in ample time to avoid any possible danger. It was about nine o'clock on a clear May morning in a small country town. It is not claimed that traffic or any other condition made driving hazardous or difficult. There was no emergency of any kind. The truck had to cross two side tracks before it could reach the main track upon which the train was coming. It was traveling at the rate of three or four miles an hour. It had to travel seventy-five feet from the time it started to cross the first side track before reaching the center of the main track. During all this time the coming train was in full view. The main track was in fact exposed to view for

approximately 1500 feet while the auto-truck was 145 feet from the track and the train must have been in view while the truck was traveling this 145 feet.

There is, we repeat, no conflict as to the foregoing facts. They are shown by the testimony of Tucker, the driver of the truck, who testified as a witness for the plaintiff. He was 145 feet from the main track when he made the turn toward the track. (Transcript p. 35) He got a clear vision as far as the oil station and a little further, which satisfied him that no train was coming from the northeast. (p. 39) From where the accident occurred to the oil tanks was about 1400 feet. (p. 35) He then looked the other way (p. 39). When he looked again to the northeast his truck was going on to the main track. The train was then coming from the northeast and was only three hundred or four hundred feet away. (p. 39) It was then too late to avoid the collision. (p. 40) It was a bright May day. No wind was blowing. There was no unusual noise to distract his attention at the time he made the crossing. (p. 42) Mr. Wright was seated with him on the right side. When he made the turn toward the track he slowed down to three or four miles an hour. When he started to make the turn—"I looked first towards the oil tanks to see that there was no train coming. I looked up the track and did not see any train coming and from

that time proceeded on my way and never looked in the same way again to see if there was a train passing until I passed a clear vision of the packing house. I was practically on the main track and looked and saw the train coming on us." (pp. 43-4) "The view was not obstructed in any way. The only thing there was to obstruct our vision, if it can be an obstruction, were some telegraph poles. *The whole space there was unobstructed and there was no reason why if I had looked I couldn't have seen the train approaching.* I am sure Mr. Wright's eyesight was good. It was good so far as I know, and his hearing was good." (p. 44)

The packing house referred to was to the southeast and did not interfere with his vision in the direction from which the train was coming (p. 39) which was coming from the northwest. (p. 40)

Thus, according to the testimony of the driver himself, he had an unobstructed view of the track for at least 1400 feet when he was 145 feet from the track. He further testified that "as he came nearer the line of the track, the main line where the accident occurred, I could see further and further up the main track, so before I reached the main track there was nothing to obscure my vision for miles up the track, except the poles, that I remember." (p. 45)

There can be no question that Tucker's contributory negligence was as a matter of law sufficient



to preclude a recovery by him upon his own testimony. (*New York Cent. Ry. vs. Maidment*, 168 Fed. 23, 99 C. C. A. 415; *Brommer vs. Pennsylvania Ry.*, 179 Fed. 577; *Partridge vs. Boston Ry. Co.*, 184 Fed. 211; *Northern Pac. Ry. vs. Tripp*, 220 Fed. 286; *Erie Ry. Co. vs. Hurlburt*, 221 Fed. 907; *Hall vs. West Jersey Ry. Co.*, 244 Fed. 104; *Herbert vs. Southern Pacific Co.*, 121 Cal. 227; *Green vs. Southern Cal. Ry.*, 138 Cal. 1; *Green vs. Los Angeles Ry.*, 143 Cal. 31; *Larabee vs. Western Pac. Ry. Co.*, 161 Pac. 750; *Martz vs. Pacific Electric Ry.*, 161 Pac. 16; *Arnold vs. S. F.-Oakland Terminal Ry.*, 164 Pac. 798; *Basham vs. Southern Pacific Co.* (Oct. 17, 1917), 168 Pac. 359.)

Wright was in exactly the same situation as Tucker. If anything he had a better view of the track than Tucker as he sat on the seat with Tucker on the side from which the train was coming. His eyesight and hearing were good. His attention was not distracted in any way. He was not even talking to Tucker. (p. 43) He was not engaged in driving the truck and his undivided attention could have been given to his surroundings. The fact that he did not see the approaching train while the truck was traveling at a slow rate of speed 145 feet from the turn in the road to the track, or if he did see it did not see fit to warn Tucker so obviously demonstrates his own personal negligence in the premises that argument would seem to be unnecessary, un-

less it is to be held that the fact that Tucker was driving, and Wright was not, absolved Wright from any legal duty to take the slightest care for either his own personal safety or the safety of his companion.

In the majority opinion of this Court, it is held that Wright and Tucker were not engaged in a joint or common enterprise, and that their relation was substantially the same as the ordinary relation between passenger and cab driver, and that under such circumstances Wright was responsible only for his own conduct, not for Tucker's.

It seems to us that under the facts and authorities cited in the brief of plaintiff in error, the relation between Tucker and Wright was not that of the ordinary relation between passenger and cab driver. Wright had rented the truck and had secured Tucker's services partly to "demonstrate" the truck, as Wright was contemplating buying it, and partly to enable Wright, who was in the drayage business, to make certain transfers with the truck. At the time of the accident, the truck was loaded with distillate which was being hauled for Wright. (p. 33) Their relation was that of principal and agent, or master and servant, rather than of a passenger and cab driver, and if we are correct as to this, Wright was responsible for Tucker's negligence as well as his own.

This question is, however, immaterial, if we are correct in our contention that even if the relation between Wright and Tucker be conceded to be such that Wright was responsible only for his conduct, Wright was nevertheless bound to exercise ordinary care for his own safety.

The fundamental principle underlying all these cases is that one cannot recover damages for injury to the commission of which he has directly contributed, and as stated by the United States Supreme Court in *Little vs. Hackett*, 116 U. S. 371, "It matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which if performed would have prevented it. If his fault, whether omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong."

This rule, as we shall see, applies to a passenger in an automobile as well as to the driver. The law fixes no different standard of duty for him than for the driver. Each is bound to use reasonable care. What conduct on the passenger's part is necessary to comply with his duty must depend upon all the circumstances. It may very well be that the conduct required to fulfill that duty on the part of the passenger may be different from that of the driver because his circumstances are different. His duty,

however, continues. Thus in *Parmenter vs. McDougall*, 172 Cal. 306, the Court said:

“As we said in *Thompson vs. Los Angeles, etc., R. Co.*, 165 Cal. 748, (134 Pac. 709), after declaring that the negligence of the chauffeur of an automobile was not to be imputed to the plaintiff, a passenger in the automobile, ‘it is, of course, true that a passenger in a vehicle operated by another is bound to exercise ordinary care for his own safety.’ Likewise, in the *Fujise* case, cited above, the Court of Appeal said that ‘the rule (that the negligence of the driver is not imputed to the passenger) ‘does not absolve the passenger or guest from the duty of using ordinary care for his own safety. No one can be allowed to shut his eyes to danger in blind reliance upon the unaided care of another, without assuming the consequences of the omission of such care.’ The same principle is declared in *Bresee vs. Los Angeles Traction Co.*, 149 Cal. 131, (5 L. R. A. (N. S.) 1059, 85 Pac. 152), and has been applied by courts of other jurisdictions in many cases, a few of which we cite. (*Adler vs. Metropolitan St. R. Co.*, 84 N. Y. Supp. 877; *Davis vs. Chicago, etc., R. Co.*, 159 Fed. 10, (16 L. R. A. (N. S.) 424, 88 C. C. A. 488); *Walsh vs. Altoona, etc., R. Co.*, 232 Pa. St. 479 (81 Atl. 551); *Ewans vs. Wilmington City R. Co.*, 7 Penne. (Del.) 458, (80 Atl. 634); *Wachsmith vs. Baltimore & O. R. Co.*, 233 Pa. St. 465, (Ann. Cas. 1913B, 679, 82 Atl. 755); *Brommer vs. Pennsylvania R. Co.*, 179 Fed. 577, (29 L. R. A. (N. S.) 924, 103 C. C. A. 135); *Trumbower vs. Lehigh Valley T. Co.*, 235 Pa. St. 397, (84 Atl. 403); *City of Vincennes vs. Thuis*, 28 Ind. App. 523, (63 N. E. 315); *Bush vs. Union Pac. R. Co.*, 62 Kan. 709, (64 Pac.



624); *Brickell vs. New York, etc., R. Co.*, 120 N. Y. 290 (17 Am. St. Rep. 648, 24 N. E. 449); *Canter vs. City of St. Joseph*, 126 Mo. App. 629, (105 S. W. 1)."

This is also the rule in the Federal Courts. (*Davis vs. Chicago Ry. Co.*, 159 Fed. 10; *Rebillard vs. Minneapolis Ry. Co.*, 216 Fed. 503; *Brommer vs. Pennsylvania R. Co.*, 179 Fed. 577; *Hall vs. West Jersey Ry. Co.*, 244 Fed. 104.)

In *Davis vs. Chicago Ry. Co.*, 159 Fed. 10, plaintiff was a guest of the driver and they were traveling together in companionship in the driver's vehicle on a mission of mutual interest, the plaintiff having as much right as the driver to direct their course. The Court said:

"Under the facts of this case, the relation that plaintiff sustained to his companion, Pfeutze, did not permit him to sit dumb and inert in the vehicle, taking no heed of a known danger, permitting Pfeutze to drive him into a pitfall or onto a deadly railroad track, implicitly trusting his life and limbs to the discretion of his companion, without a word of warning or protest. It is now the better recognized rule of law that as to such a person situated as was the plaintiff, riding in a vehicle in mere companionship with his friend, engaged upon a mutual adventure, it is as much his duty as that of the driver to take observations of dangers, and to avoid them, if practicable, by suggestion and protest. In other words, he is required to exercise ordinary care to avoid injury."

In *Birckell vs. New York R. Co.*, 120 N. Y. 290) 24 N. E. 449, 17 Am. St. Rep. 648, it is said (*italics ours*):

“The rule that the driver’s negligence may not be imputed to the plaintiff should have no application to this case. Such rule is only applicable to cases where the relation of master and servant or principal and agent does not exist, *or where the passenger is seated away from the driver by an inclosure, and is without opportunity to discover danger and to inform the driver of it.* It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver to learn of danger, and to avoid it if practicable.”

This is quoted with approval in *Davis vs. Chicago Ry. Co.*, *supra*, the Court adding that this rule is supported by persuasive authority, citing a number of cases.

In *Rebillard vs. Minneapolis Ry. Co.*, 216 Fed. 503, the Court refers to the rule that the contributory negligence of the driver of a public conveyance would not be imputed to a passenger, but adds that “an examination of the many cases on that question shows that the writers of the opinions are careful to except a passenger or guest who with knowledge of the danger remains in such dangerous position.” The opinion also quotes with approval from *Brickell vs. New York Ry. Co.*, *supra*, the statement that the rule that the driver’s negligence may not be imputed to the plaintiff is only applicable to cases where the

relation of master and servant or principal and agent does not exist, or where the passenger is seated away from the driver by an enclosure and is without opportunity to discover danger and to inform the driver of it.

The distinction thus drawn between the duty of a passenger who is seated in the front seat with the driver and one who is seated in a rear seat is important, and has not been lost sight of by the courts. Thus in *Brommer vs. Penn. Ry. Co.*, 179 Fed. 577, the opinion dealt with three cases which were tried together and so argued on appeal. Brommer was driving an automobile over a railroad crossing when it collided with a train. In the automobile were Mr. and Mrs. Henderson and Mrs. Blockson, all of whom Brommer had invited to ride with him. Mrs. Henderson was killed and the other three occupants injured. These three brought suits. The trial Court held Brommer guilty of contributory negligence and directed a verdict against him. Verdicts were recovered by Henderson and Mrs. Blockson. Brommer appealed from the judgment against him and the railroad company likewise appealed from the judgment in favor of Henderson and Mrs. Blockson.

The Circuit Court of Appeals, Third Circuit, affirmed the judgment against Brommer, the driver, upon the ground that he was clearly guilty of contributory negligence. It reversed the judgment in favor of Henderson, who sat on the front seat with

Brommer, upon the ground that Henderson was equally culpable with Brommer, but affirmed the judgment in favor of Mrs. Blockson, who sat in the back seat of the automobile, and who was not in as good a position to see the approaching train as the others, upon the ground that, under the state of the proof, the Court had no facts upon which it could say, as a matter of law, that Mrs. Blockson was guilty of contributory negligence. Speaking with reference to Henderson, who was in the seat with the driver, the Court said after quoting from *Little vs. Hackett, supra*:

“It follows, therefore, that Henderson was under obligations to take due care of his own safety. He was not a passenger for hire. He was engaged in the common purpose of a pleasure ride with the driver of the machine. He knew they were approaching a railroad crossing. Being free from the engrossing work of operating the machine, and occupying a seat beside the driver, he was in an even better situation than Brommer to look out for the safety of the machine. His own safety and the instinct of self-preservation should have led him to do so.”

In *Hall vs. West Jersey Ry. Co.*, 244 Fed. 104, the plaintiff was a passenger on the front seat of the auto in which she and six others were taking a pleasure ride. The auto ran into the side of an electric train which was passing on a grade crossing. Three women were on the front seat of the car. The



woman who was driving was killed. Plaintiff sat on the knee of the second woman who was on the front seat. The Court, after quoting from the decision in *Brommer vs. Pennsylvania R. Co.*, *supra*, said, "Under such circumstances there was no disputable issue. The evidence simply showed the plaintiff and the unfortunate person who was driving the car took no care or precaution whatever and blindly went forward, the one to her death and the other to her distressing accident, in such a careless and negligent way that they contributed to the accident. \* \* \* The fact that they went ahead, and that the auto ran into the train, simply shows that the persons on the front seat did not look, but went ahead without any precaution, and for an auto to attempt to pass, without precaution, a grade crossing, where a view of the track is obstructed, is chancing a crossing and chancing danger is not due care."

In the case at bar there was nothing to obstruct the view. As the driver himself testified, "I could see further and further up the main track", as he approached the track, "so before I reached the main track there was nothing to obscure my vision for miles up the track except the poles, that I remember." (p. 45)

In *Colorado Ry. Co. vs. Thomas*, 33 Colo. 517, 3 Ann. Cas. 700, both the driver and his companion

were riding in a buggy and were struck and killed at a railroad crossing at night. The Court held that while the negligence of the driver was not imputable to his companion, the latter was responsible for his own conduct in the premises, which in the circumstances of the case the Court held was grossly negligent and contributed directly to produce the unfortunate casualty, and accordingly reversed the judgment in his favor entered in the trial Court. In its opinion the Court called attention to the fact that the plaintiff was upon the seat with the driver, with the same knowledge of the road, the crossing and environments, and with at least the same if not better opportunity of discovering dangers that the driver possessed, and that "the testimony is wholly to the effect that the plaintiff committed himself voluntarily to the action of Fields, that he joined him in testing the danger, and that he is responsible for his own act."

So in the case at bar it appears without conflict that the deceased was familiar with the crossing and its environments. He had been in the truck business in that locality for a number of years. (Transcript p. 69)

In *Caminez vs. Brooklyn R. Co.*, 127 App. Div. N. Y. 138, it is held that one who was sitting on the seat of a truck with the driver is injured by a collision with a car and admits that he paid no attention to the car and did not look up and down while cross-

ing the track and took no care to avoid an accident is, as a matter of law, guilty of contributory negligence. In this case, as in the present case, the plaintiff was seated upon the seat of the truck alongside of the driver.

In *Allyn vs. Boston Ry. Co.*, 105 Mass. 77, plaintiff testified that he did not know of the crossing and did not look up, and that the driver was careful and the horse safe, but there was no evidence that the driver looked to ascertain whether a train was coming. It is held that there was no evidence before the jury that the plaintiff was in the exercise of due care.

In *Miller vs. Louisville Ry. Co.*, 128 Ind. Rep. 97, the wife was riding in a wagon with her husband who was driving. Her husband attempted to cross in front of a train and both were killed. It was held that the wife in failing to warn the husband or to look or listen for approaching trains was guilty of contributory negligence and that there could be no recovery for her death.

In *Lake Shore Ry. Co. vs. Borts*, 16 Ind. App. Rep. 640, it was held that where one is riding in a vehicle as the guest of the driver, it is no less his duty than it is the duty of the driver when approaching a railroad crossing to look and listen to learn of danger and avoid it if practicable, and if he gives

no notice to the driver he is guilty of such contributory negligence as will prevent a recovery by him.

In *Missouri Ry. Co. vs. Bussey*, 66 Kan. 735, it was held that the fact that the plaintiff had no control over the vehicle, the horse, or the driver, did not relieve her from her obligation to look and make some effort to avoid the danger, and that as she did not do so she was guilty of contributory negligence as a matter of law.

In *Klinczyk vs. Lehigh Valley Ry. Co.*, 152 App. Div. N. Y. 270, it is held that although the intestate was not driving the vehicle, but was seated at the side of the driver, he may be charged with contributory negligence, where he had the more convenient view of the approaching train, and was superior in authority to the driver, so that he could have ordered him to stop. In this case the Court said:

“True, plaintiff’s intestate was not driving; but his apparent authority was superior to that of the driver, for he was foreman of their common employer. He was seated on the side of the wagon from which the best and most convenient view could be had of the approaching train. The horse stopped and started up, not suddenly, but at the same easy walk at which it had previously gone. A word of warning or a touch upon the reins would have stopped the horse while still in a place of safety and the accident would have been averted.”

So in the present case, Wright was unquestionably superior in authority to the driver. The latter



was engaged upon Wright's business. At the time of the accident the truck was hauling distillate for Wright. A word of warning from Wright to the driver at any time before they reached the main track would have been sufficient.

In the majority opinion of this Court it is said, speaking with reference to Wright's situation:

“Can we say as a matter of law that he failed to use the degree of care for his own safety which an ordinarily prudent person would have exercised? If so, in what respect was he careless? What did he leave undone, that he should have done?”

The answer to this is that the railroad tracks were there as a warning of danger and that Wright should have seen the approaching train and have called the attention of Tucker thereto before they reached the track. Paraphrasing the language of the Court in *Davis vs. Chicago Ry. Co.*, 159 Fed. 10, Wright could not sit dumb and inert in the vehicle, taking no heed of a known danger, permitting Tucker to drive him into a pitfall or onto a deadly railroad track, implicitly trusting his life and limbs to the discretion of his companion without a word of warning or protest. The overwhelming weight of authority is to the effect that in such circumstances it is no less the duty of the passenger, where he has the opportunity to do so, than of the driver to learn of danger, and to avoid it if practicable.

In the majority opinion it is further said:

“We are not advised whether Wright saw the train or not as soon as it came into view, a quarter of a mile away, or before it was seen by Tucker. He might have seen it and yet reasonably have remained silent, for he might naturally have assumed that, the view being unobstructed, Tucker saw it, too, and was governing himself accordingly. So that up to the very time that the truck approached the main track he may have reasonably supposed that Tucker would stop the car in time to avoid a collision. And when he realized that he was going to attempt to cross ahead of the train, what could he do or what should he have done? Who can now say as a matter of law? Cry out? He might thus have confused and disconcerted the driver, and an instant of indecision in such a case may be fatal. Here with the truck a half a second sooner or the train a half second later, the tragedy would not have happened. It must be borne in mind that there was no time to reflect or reason. If the train was running only thirty miles an hour—the speed was probably greater—it was only about thirty seconds from the time it came into view a quarter of a mile away until it crashed into the truck.”

We submit, with great deference, that the foregoing reasoning is in conflict with the overwhelming weight of authority that “no one can be allowed to shut his eyes to danger in blind reliance upon the unaided care of another, without assuming the consequences of the omission of such care.” (*Parmenter vs. McDougall*, 172 Cal. 306, and cases cited.)

Paraphrasing the language of the Circuit Court of Appeals, Third Circuit, in *Brommer vs. Pennsylvania R. Co.*, 179 Fed. 577, Wright knew they were approaching a railroad crossing. Being free from the engrossing work of operating the machine, and occupying a seat beside the driver, he was in an even better situation than Tucker to look out for the safety of the machine. His own safety and the instinct of self-preservation should have led him to do so. In the language of the Court in *Hall vs. West Jersey R. Co.*, 244 Fed. 104, there was under the circumstances in this case no disputable issue. The evidence simply shows that the plaintiff and Tucker, who was driving the machine, took no care or precaution whatever and blindly went forward, the one to his death and the other to his distressing accident, in such a careless and negligent way that they contributed to the accident. They both chanced the crossing, and "chancing danger is not due care."

The statement in the opinion that "it must be borne in mind that there was no time to reflect or reason" and that "it was only about thirty seconds from the time the train came into view, a quarter of a mile away, until it crashed into the truck", overlooks the fact that a period of thirty seconds is ample time within which to perceive and guard against the danger of a collision with an approaching train. The train could have been seen at any time during the time that the truck was traveling 145 feet from

the turn in the road to the main line track. Assuming that this distance could be traveled at the rate of four miles an hour in thirty seconds, it is obvious that any person of ordinary intelligence would have had ample time to perceive the danger and to have stopped the truck. It was not a matter which required reflection for any substantial length of time, but that thirty seconds is in itself sufficient time for anyone to determine what should be done in a case of that character can be easily demonstrated by ascertaining what thirty seconds in point of time actually means.

It may very well be that when Wright realized that Tucker was going to attempt to cross ahead of the train it was too late to cry out, but this will not aid Wright, who should have discovered and warned Tucker of the situation before it became perilous. The perilous position that existed when they had reached the track was the result of their own negligence, and one cannot create a cause of action in his own favor by reason of his own negligence. As was said by the Court in *Richfield vs. Michigan Central R. Co.*, 110 Mich. 406:

“The rule was settled in that case that where, by the negligence of the defendant, the plaintiff was put in a place of danger, and if, in an attempt to extricate himself from it, he did not take the best hazard, he would not be charged with contributory negligence. This, as we understand it, is as far as the rule extends. In the



present case, however, there is not a particle of showing that the women exercised the least care in approaching this crossing. They were familiar with the streets and the crossing, and yet drove along, laughing and talking, and apparently giving no heed to the approach of a train. If they had been exercising any care, they would have heard or seen what others saw and heard. They were not drawn into a position of peril by the negligence of the defendant, but, by their own negligence, had placed themselves in such a position, and, being there, took their chance of crossing in front of the train. We think the Court should have directed a verdict in favor of the defendant."

In *Lake Shore Railway Co. vs. Miller*, 25 Mich. 274, the plaintiff was in a lumber wagon driven by one Eldridge. They were struck by a train at a railroad crossing, which they attempted to cross without either taking any precaution. After stating the facts the Court adds:

"Comment can add nothing to such a state of facts. No logic can find in it, or extract from it, the faintest manifestation or idea of that reasonable care or common prudence which the circumstances demanded in approaching the crossing. Without necessity, and of their own accord, they move heedlessly into danger, and meet destruction, equaling in courage, excelling in composure, the immortal six hundred at Balaklava; but in care and circumspection, rivaling only the commander who ordered that 'rash and fatal charge.' "

After citing a number of authorities the Court adds:

“That such failure, under such circumstances, to make use of any means to ascertain whether a train is approaching, before venturing upon the track, must of itself be pronounced negligence, as matter of law, is a proposition as sound in principle as it is well supported by authority. The laws of nature and of the human mind, at least such of them as are obvious to the common apprehension of mankind, as well as the more obvious dictates of common sense and principles of human action—which are assumed as truths in any process of reasoning by the mass of sane minds—constitute a part of the laws of the land, and may, and must, be assumed by the Court, without being found by a jury; indeed, the finding of a jury, which should clearly disregard them, should itself be disregarded by the Court. In other words, Courts are bound judicially to know and apply such laws and principles as part of the law of the land. They are bound to know that there is a difference between *reasonable care* and *no care at all*, or utter negligence, and that a prudent man, in the presence of danger, naturally and ordinarily makes some use of his faculties to ascertain and avoid it; and if, upon any occasion, he does not, when he has good reason to apprehend danger, he does not exercise the ordinary or reasonable care demanded by the circumstances.”

In the case at bar the undisputed facts lead to the inevitable conclusion that no care whatever was exercised by Wright when they approached the crossing. The irresistible inference is that like Tucker,

he did not look at all from the time they made the turn toward the crossing until it was too late. If he did look he could have seen the train in ample time to warn Tucker of the danger and every instinct of self-preservation would have impelled him to give such warning. If he did look and yet failed to warn Tucker, his negligence was all the more culpable. In either event he was, as a matter of law, guilty of such contributory negligence as to preclude any recovery by his heirs.

In the dissenting opinion filed by Judge Hunt in this case, it is stated that under the undisputed facts and circumstances it should have been held that Mr. Wright as well as Mr. Tucker failed in the duty to exercise ordinary and proper care for his own safety and by his omission to do so directly contributed to cause the accident. Judge Hunt was further of the opinion that "nevertheless, whether or not the engineer actually saw the truck, and observing its movements saw the peril of the men, was guilty of omission to use the means at his hand to give timely warning, and if necessary slow down and thus avoid collision with the truck and injury to the men in it, was for the jury to determine. *Grand Trunk Ry. Co. vs. Ives*, 144 U. S. 408; *Fluckey vs. Southern Ry. Co.*, 242 Fed. 468. But as the District Court expressly charged the jury that the "last clear chance doctrine" had no application, the jury was precluded from considering the phase of the case just referred to.

As the trial Court expressly charged the jury that the "last clear chance doctrine" had no application, this question was not discussed in the brief of Plaintiff in Error in this Court, except in the incidental reference thereto in the additional authorities cited by Plaintiff in Error quoting the decision of the Supreme Court of California in *Basham vs. Southern Pacific Company*, 168 Pac. 359. This decision was cited primarily for the purpose of showing that the negligence of Tucker and Wright was sufficient, as a matter of law, to preclude any recovery by them.

In the case at bar there was no evidence whatever introduced showing that the engineer or the fireman was guilty of any negligence after they had actual knowledge of the danger in which Tucker and Wright had placed themselves. The rule of "last clear chance" is not based upon opportunity by the exercise of common prudence to observe the danger in which another has placed himself, but upon actual knowledge of such peril. The Supreme Court of California has held, again and again, that even where the motorman or engineer has by gross negligence omitted to keep an outlook which might have resulted in his discovery of the plight of a person on or near the track, that fact may not avail the negligent person injured. (*Starck vs. Pacific Electric Ry.*, 172 Cal. 277 and cases cited; *Basham vs. Southern Pacific Co.* (Cal.), 168 Pac. 359). It is



also there stated that the persons operating the train have the right to presume that the other party will exercise his faculties and use reasonable care for his own safety, and that it is a matter of common knowledge that both pedestrians and vehicles will approach close to a track before stopping, and that it is not until the party approaching the track is in actual danger and the engineer or the fireman become aware of such danger that they are required to take any steps to prevent a collision. *Starck vs. Pacific Electric Ry. Co., supra; Basham vs. Southern Pacific Co., supra.*

In the case at bar the uncontradicted evidence shows that when the auto-truck reached the main line track the train was somewhere between two hundred and four hundred feet away, coming rapidly. Up to this time both the engineer and fireman had the right to assume that the truck would stop before reaching the track. When it did reach the track it was obviously too late to avoid the accident through any efforts on the part of the trainmen. The burden of proof of showing that the accident could have been avoided by the trainmen after plaintiff had thus placed himself in a situation of peril was on the plaintiff (*Basham vs. S. P. Co., supra*), but as there was no evidence whatever introduced showing that the accident could have been avoided by the trainmen after the truck had reached the track, and as all the established facts are clearly to the contrary,

there was nothing which would justify the submission of this question to the jury, and the trial Court was not in error in so ruling.

This case is important not only to the Southern Pacific Company, but to all railroad companies, because of the increasing frequency of accidents at railroad crossings due to the carelessness of automobile drivers and those accompanying them. It is, we think, a matter of common knowledge that in practically every accident at a railroad crossing witnesses can be found who will testify that they did not hear the bell or whistle, so that the question as to the company's negligence in such cases will always be a question of fact for the jury, and if the decision in this case is to stand it will mean that in no crossing case can it be held that the passenger's contributory negligence was sufficient, as a matter of law, to preclude a recovery of damages; for we can conceive of no case where the admitted facts could establish a clearer case of contributory negligence than the facts in the case at bar.

It is respectfully submitted that a rehearing should be granted.

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*Of Counsel.*

We hereby certify that the foregoing petition is  
well founded and is not interposed for delay.

R. L. Carey and

Wm. F. Harris

Attorneys

Of Counsel.

Attorneys

for Plaintiff in Error.

No. 2942

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit.

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SOUTHERN PACIFIC COMPANY,  
(a corporation),  
*Plaintiff in Error,*

vs.

GERTRUDE WRIGHT and ORENE WRIGHT  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, their Guardian *ad litem*,  
*Defendants in Error.*

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## ADDITIONAL AUTHORITY CITED BY PLAINTIFF IN ERROR.

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In Error to the United States District Court of the  
Southern District of California, Northern Division.

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L. L. CORY,

ELMER WESTLAKE,

*Attorneys for Plaintiff in Error.*

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Filed this.....day of October, 1917.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.





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## ADDITIONAL AUTHORITY CITED BY PLAINTIFF IN ERROR.

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Since this case was submitted the Supreme Court of the State of California has rendered a decision which is deemed by us to be conclusive of this case. The decision referred to is that of the California Supreme Court, In Bank, in the case of *Mary T. Basham, as administratrix of the estate of O. A. Coffey, deceased, plaintiff and respondent, vs. Southern Pacific Company (a corporation), and F. Gehrmann, defendants and appellants*, decided October 17, 1917, and reported in The Recorder of October 22, 1917, published in the City and County of San

Francisco. The prevailing opinion in the *Basham* case reads as follows:

“This action was begun by Eva M. Coffey as administratrix of the estate of her deceased husband, O. A. Coffey, to recover damages caused by the death of her husband, alleged to have been the result of negligence of the defendants. The verdict was given for the plaintiff and the defendants appeal from the judgment.

After the taking of the appeal Eva M. Coffey died, and Mary T. Basham was duly appointed as administratrix of said estate, and she has been substituted as plaintiff herein.

The accident occurred in the city of Merced, on the main track of the Southern Pacific Railroad, at the crossing of R street. The deceased was traveling on R street from the north toward the south, toward said crossing, at the time the train approached the city of Merced. He was in a farm wagon, driving two horses, and leading two others which were hitched to the rear of the wagon bed. The bed was what is called a grain wagon bed, composed of timbers and planks set upon the running gears, and not extending above the wheels. He was sitting about one-third of the way back from the front of the bed, either on a box or on some sacks. The horses were gentle and entirely under control. They were walking at the rate of about three miles an hour. As the train neared the crossing of R street the engineer whistled for the crossing at the usual place. The train had previously been going at very great speed to make up some lost time, having made up nine minutes of the time in the preceding fourteen miles. The track had a very slight down grade at that place, and at a point one mile from the station at Merced the steam had been shut off and the train was running on

its momentum. After shutting off the steam the brakes were applied at intervals to slacken the speed. At a point from eight hundred to one thousand feet from R street the engine whistle was blown for the R street crossing. The fireman was engaged in looking ahead for obstructions upon the track and giving directions to the engineer regarding them; the engineer was managing the machinery of the locomotive and brakes. These were their respective duties. At that time the fireman saw Coffey approaching the track on R street, leaning forward, with the reins in his hands. The fireman said to the engineer, "Blow your whistle; there is a fellow coming over here and I don't know whether he sees us or not." The engineer then gave several sharp, short blasts of the whistle as a warning of danger to attract the attention of Coffey. The train was then proceeding at a speed variously estimated at from fifteen to thirty miles an hour, and its speed was slackening as it proceeded. At the rate of thirty miles an hour it would take eighteen seconds to reach R street. At the time the fireman first saw Coffey, he, Coffey, was about one hundred feet from the main track on which the train was running. He continued to approach the track without increasing his speed, in the same attitude, until the team had reached a point some twenty or thirty feet from the track, and the engine was within about one hundred fifty or two hundred feet from the crossing. Coffey was then giving no sign that he observed the train or that he intended to stop before driving upon the track. That instant the fireman for the first time realized that he might not be aware of the approaching train. He cried to the engineer, "Hold her; that guy ain't going to stop." The engineer immediately applied the emergency brake and stopped the train as quickly as it could be done. Coffey made no move indicating his knowledge



of the approaching train until his horses had stepped upon the track; then, seeing his danger, he arose in the wagon bed, grasped a pitch-fork, and began striking the horses to hurry them up. He failed to get across and the engine struck the rear wheels of the wagon, the collision resulting in his death.

It is not seriously disputed that the engine was running at a rate of speed that amounted to negligence at that point in the city of Merced, nor is it seriously disputed that Coffey was guilty of almost gross negligence in going upon the track without having observed the coming of the train, without stopping to listen for its approach, and without hearing the sharp blasts of the whistle to indicate danger. Admitting negligence by the defendants, it must be also admitted that the negligence of the deceased contributed to the accident, and would prevent a recovery unless it can be said that there was sufficient evidence to sustain a finding that, after the fireman had discovered the approach of Coffey, and had realized that he was probably not intending to stop before going upon the track, or when, as a reasonable man, from the conduct of Coffey, the fireman should have realized that he was either unaware of his danger or indifferent thereto and did not intend to avoid it, the fireman himself neglected to give the signal to the engineer to apply the emergency brake, and that because of this neglect the accident happened.

We do not think it can be said that the evidence is sufficient to prove such negligence by the fireman. It was the duty of Coffey in the exercise of ordinary care, when approaching the railroad track, even at the slow speed at which he was going, to stop and look and listen for the approach of trains. His rate of travel was so slow that it is obvious that he could have stopped

at almost any moment, up to the time when his horses came within the line of travel of the railroad cars, and by so doing have avoided all danger. At the distance of twenty feet from the track, and from that time until he reached it, he could have seen the train if he had simply turned his head in that direction, and could have stopped his team within a very few feet. The fireman had a right to assume that he would stop before reaching the track, until his conduct gave reason to believe that he would not, and until that moment the fireman cannot be said to have been guilty of negligence in failing to call for the emergency brake. When a person is approaching a place of danger, and all the warnings of the danger have been given that reasonable care requires, those in charge of the dangerous engine, seeing him thus acting, are not obliged to presume, and it cannot be said that they act unreasonably in not presuming, that the person will continue in his approach until he gets into the very place of danger, when it is obvious that he could at any time, with the least care, stop and avoid it. The doctrine of the last clear chance assumes that both the plaintiff and the defendant have been guilty of negligence, the combination of which produces the danger, and places the injured party in a predicament from which he cannot extricate himself, and that this predicament is known, or should be known, with the knowledge actually possessed, to the other party. It is not until this takes place that the duty of additional care devolves upon the person causing the injury. The person thus causing the injury cannot rely upon dullness to excuse him for not knowing that the other party was not aware of danger. He must be held to know this when the circumstances of which he has knowledge are such as would create in the mind of a reasonable man a belief, or a reasonable fear, that the other

party was in such precarious situation. (*Thompson vs. Los Angeles, etc., Co.*, 165 Cal. 748; *Harrington vs. Los Angeles, etc., Co.*, 140 Cal. 523; *Everett vs. Los Angeles, etc., Co.*, 115 Cal. 125.) The persons thus operating a train have the right to presume that the other party will exercise his faculties and use reasonable care for his own safety. In *Holmes vs. South Pacific, etc., Co.*, 97 Cal. 168, the facts were that, as the train approached, the injured person was walking alongside of the track, and very close thereto. Just before it reached him, the alarm whistle was sounded, and he stepped upon the track and was killed. The bell was ringing all the time. The court said that the persons in charge of the train were not guilty of negligence in not sooner sounding the alarm whistle, and that, 'as the deceased was a man of mature years, and nothing to indicate that he was not able to take care of himself,—as he was in fact,—the engineer might reasonably believe that he knew of its approach, and would, in obedience to the ordinary instinct for self-preservation, move away from the track before being overtaken by the engine.' And with respect to the last clear chance, the court said (p. 170), 'The defendant was not the only one who could have prevented the accident, but, on the contrary, if the deceased had himself used ordinary care at the time, he could not possibly have been harmed by defendant's locomotive, which was confined to the narrow track upon which it ran. Up to the very moment that he was struck by the engine it was within his power to escape the injury which he received, by simply moving to a place of safety upon the sidewalk, and he would have realized the necessity for such action on his part but for his own negligence at the time in not looking or listening for the approach of the train.' Upon the facts, the court applied the principle that the doctrine of the last clear chance



‘cannot govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them.’

In *Green vs. Los Angeles, etc., Co.*, 143 Cal. 31, the injured person was walking along a path which ran across the track, and was approaching the track thereon at the time the defendant’s locomotive came along. The path crossed the track at an angle of thirty degrees, and her course was on the path in the direction which caused her face to be turned partly away from the approaching train. The court says that the findings in effect declare, ‘that the engineer saw Bessie Green approaching the track along a path which crossed it; that she gave no evidence of knowledge of the approach of the train; and that, notwithstanding such fact, the engineer did not slacken or lessen the speed of the train, or attempt to give said Bessie Green warning of his approach.

‘But during all this time, it will be observed, Bessie Green was in a position of absolute safety; she was not upon the defendant’s track, but walking upon the pathway approaching it. There was nothing to indicate to the engineer that she would leave that place of safety and put herself in one of danger. The mere fact that she gave no evidence of a knowledge of the approach of the train while walking along the pathway towards the track did not indicate to the engineer that she was about to place herself in a position of peril. It is a matter of common observation that thousands of people daily cross in front of trains and approach crossings for that purpose, without giving any indication that they are aware of the coming of the train. They proceed, determining for themselves whether they have sufficient time to make the crossings safely or not,



solicitous only for their personal safety, and giving no indication to the engineer whether they will hazard the risk of crossing, or pause until the train passes by, or in any manner indicating that they are aware of the approach of the train, or are concerned about it. . . .

‘There is nothing to indicate that, as far as the engineer knew or could have known, Bessie Green might not have been perfectly well aware of the approach of the train and still have given no indication or manifestation of that knowledge. The law cast upon her the duty of looking to see, when approaching the point of danger, whether there was a train in sight which might prevent her crossing the track in safety, and the engineer had a right to assume that she had taken the precaution which the law required to insure her own safety, was aware of the situation, and, being in a place of safety, would remain there and not pass to a point of danger.’

The facts in this case are closely similar. Coffey’s horses were approaching the train in a slow walk, they were under control, and did not appear to be in the least excited. The train was necessarily making considerable noise; it had just previously given several short, sharp blasts, to indicate danger; it is conceded that the bell was ringing. Coffey could have stopped his horses within four feet of the track without being in danger, and doubtless could have accomplished the stop within a space of two or three feet before reaching that point, and the fireman had the right to assume, until the conduct of Coffey indicated the contrary, that he knew of the approaching train and would stop before driving into its path. The fireman himself testified that ‘time and again you will see a team driving along and they pay no attention to your signals. They will come up and stop in the clear of the track

and wait for you to go by.' This testimony accords with what the court says is common knowledge in the quotation just made. There is no evidence to contradict these facts, and no circumstances which throw doubt upon them.

There was, to be sure, some discrepancy in the figures given by the different witnesses regarding the relative locations of the train and the wagon at the moment when the warning signal was first sounded. Such variations in estimates of distances are neither unusual nor surprising. But, giving to the respondents the full benefit of the testimony offered by them, we think the record was not such as to warrant a conclusion that the facts were *materially* different from our statement of them. Granting that the train may have been less than eight hundred feet from the crossing when the warning signal was given, and that the fireman's estimates of Coffey's location were not exactly accurate, it appears from a fair consideration of the entire record, that warning signals were sounded when Coffey was still in a place of safety. The 'last clear chance' doctrine can have no possible application, unless there was evidence tending to show that the fireman neglected to take steps which due care would have required, when he saw the team and wagon in a position which would have indicated to a reasonable man that Coffey was already in danger, or was immediately about to enter the danger zone. The testimony established beyond question that Coffey was guilty of inexcusable want of care in placing himself in peril. The burden of proving that the defendant, after seeing him in such a position, failed to take proper care to avoid injuring him, was on the plaintiff. She seeks to sustain this burden by pointing to the testimony by one or two witnesses, to the effect that the horses were already on the track when the danger signals were blown, and that the train

was then within one hundred fifty or two hundred feet of the crossing. This testimony, vague and uncertain at best, is contradicted not only by that of other witnesses on both sides, but by the inherent probabilities of the situation. Even if it be accepted as sufficient to form the basis of a finding, it does not meet the needs of the plaintiff's case, unless supplemented by evidence that the fireman was at fault in not then doing what a reasonably careful man would have done to avert the impending collision. It is argued to this end that the testimony of the fireman and the engineer shows that the fireman did not call for the application of the emergency brake until some period of time had elapsed after the giving of the warning signal. During this interval, it is said, the fireman failed to take any steps to slow the train so as to permit Coffey to cross in safety. The argument thus made assumes the truthfulness of the fireman's testimony with respect to the directions to the engineer to blow the whistle and apply the brakes. It assumes, on the other hand, that he did not testify truthfully to the conditions existing when he gave the respective orders. The hypothesis is that the brakeman told the engineer, in effect, that a man was approaching the track, and that a whistle should be blown to warn him to stop, when he saw the man already on the track, or so near as to make it plain that he would presently be on it. If the situation was as testified to by the fireman, his statement to the engineer was in accord with the facts, and his conduct was reasonable and intelligible. If the situation was as plaintiff now claims, the fireman's direction to the engineer was obviously futile and meaningless. It would require an unduly strained construction of the evidence to hold that the jury was warranted in accepting the part of the fireman's testimony which described what he did, and rejecting that



part which gave purpose and sense to his actions. Moreover, if the fireman's second warning was so soon after the first, and when the train was so near the crossing as this theory implies, the discovery that Coffey was going to cross the track must have come too late, and when it was made the collision had already become inevitable. The failure to discover it sooner might in that case constitute original negligence, but it would not be a ground for applying the doctrine of the last clear chance. The record convinces us that there is no substantial evidence that the train crew failed to do all that reasonably ought to have been done to avert a collision, as soon as it was, or should have been apparent that the driver was not stopping his team in a place of safety.

With respect to the engineer who was operating the train, and Coffey, the negligently fast speed of the train, and the negligent inattention of Coffey, each contributed to and caused the injury, and each continued actively to that result up to the very moment of the collision, thus bringing the case within the rule stated in *Holmes vs. South Pacific, etc., Co., supra*. The plaintiff cannot recover for an injury so caused.

With regard to the last clear chance doctrine, it cannot be said that the fireman was guilty of negligence in failing sooner to realize that Coffey was probably oblivious of his danger. The staccato notes of the danger whistle just then sounded, as the evidence shows, had attracted the attention and aroused the alarm of almost everyone in the vicinity, although none of them had as much need or occasion to be alert thereto as Coffey. The bell of the engine was continuously ringing. The moving train itself must have made considerable noise. The horses were in a slow walk. The lines were in Coffey's hands. The



horses were under his control. He could have come to a standstill in a second. Under all these circumstances it would be extremely unreasonable for anyone to suppose that he was unaware of the approaching train, and did not intend to stop before reaching the track, as he could easily have done, and as is the frequent custom. When the fireman did, nevertheless, begin to entertain a fear that Coffey was inattentive, he at once gave the urgent order to the engineer to stop. It cannot be said either that he did realize the danger sooner, or that, in reason, with his knowledge, he had cause to realize it sooner. Hence the last clear chance doctrine never came into operation, and the case comes within the scope of the case of *Green vs. Los Angeles, etc., Co., supra*.

This conclusion renders it unnecessary to determine the other questions presented by the record and argued in the briefs. The evidence was insufficient to support the verdict.

The judgment is reversed."

We respectfully submit that the reasoning of the foregoing opinion, when applied to the facts of the case at bar, shows that as a matter of law both Tucker and Wright were guilty of contributory negligence, preventing a recovery herein, and that the doctrine of "last clear chance" (even assuming that the Court below had not eliminated such doctrine from the case), has no application to the facts of the instant case. These propositions, we think, need no elaboration, the language of the decision itself being sufficiently clear and convincing and demonstrative of the soundness of the position of plaintiff in error.

It is, therefore, respectfully submitted that the judgment herein should be reversed.

L. L. CORY,  
ELMER WESTLAKE,  
*Attorneys for Plaintiff in Error.*



No. 2942

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY,  
a corporation,

*Plaintiff in Error,*

VS.

GERTRUDE WRIGHT and ORENE WRIGHT  
and ORA WRIGHT, by GERTRUDE  
WRIGHT, their Guardian *ad litem*,  
*Defendants in Error.*

## ADDITIONAL ARGUMENT FOR PLAINTIFF IN ERROR

In Error to the United States District Court of the Southern  
District of California, Northern Division.

L. L. CORY,  
ELMER WESTLAKE,  
*Attorneys for Plaintiff in Error.*

Filed

MAY 18 1917

Filed this.....day of May, 1917 **D. Monckton**

FRANK D. MONCKTON, Clerk.

Clerk.





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**ADDITIONAL ARGUMENT FOR PLAIN-  
TIF IN ERROR**

At the conclusion of the oral arguments in this case, May 9th, 1917, plaintiff in error requested and was granted permission to submit, within ten days, additional printed argument with respect to the contentions advanced by defendants in error in their printed brief and upon the oral argument.

Before proceeding with the discussion of the points made by counsel for defendants in error in their brief and upon the oral argument, certain statements in the printed brief under the heading "Statement of Case" require comment. The first

of such statements is that at the time of the accident the train was running "at a rate of about 42 miles per hour" (Brief, p. 2). All of the evidence is to the effect that the train was going at the rate of 30, or about 30, miles an hour (Tr. pp. 50, 58 and 60).

The next statement demanding attention is this: "Then as soon as his attention could be taken from the danger of trains coming from the south he saw the train coming from the north at a point 300 or 400 feet from the crossing. This was at the instant that the front wheels of the truck were going upon the main track of the railroad at the crossing" (Brief, p. 4).

It will be noted that counsel's statement assumes that in traveling a distance of 145 ft. (the only point where Tucker and Wright looked in the direction of the approaching train) at the rate of 3 or 4 miles an hour, one could not with safety look again to the north but must keep his eyes glued to the south. At the rate of 4 miles an hour it would have taken the truck about 24 seconds to traverse the 145 ft.; at 3 miles an hour about 32 seconds. To say that one cannot with perfect safety glance in both directions half a dozen times within that distance at that speed is directly opposed to common knowledge. One has but to make the experiment to demonstrate the accuracy of our statement and the absurdity of counsel's position. Nor does the evidence show that when Tucker first saw the train

“the front wheels were going upon the main track of the railroad at the crossing.” Tucker stated (Tr. p. 39) “It had reached the point where the truck was *practically* going on to the main line track” and (Tr. p. 45) “the front wheels of the truck were just *about* on the main track.” If the front wheels were on the main track and the truck, which was not over 12 ft. in length, was traveling 3 miles an hour, and the train was 400 ft. distant and traveling 30 miles an hour, the truck would have traveled one-tenth the distance covered by the train or 40 ft., and the track being 4 ft. 8½ in. in width, the rear end of the truck would have been about 23 or 24 ft. in the clear by the time the train arrived at the crossing. If the train was going 42 and the truck 3 miles an hour, the truck would have covered one-fourteenth of 400 ft. or between 28 and 29 ft., and its rear end would have been 11 or 12 ft. in the clear. Counsel’s final conclusion, as evidenced by the brief, is that the train was 300 ft. distant and the truck was traveling 4 miles an hour and the train 42 miles an hour. The truck would therefore have traveled between 28 and 29 ft. by the time the train had reached the crossing and the rear end of the truck would therefore have been 11 or 12 ft. in the clear. These figures demonstrate conclusively that the truck was not on the main track when Tucker first saw the train, but that (as Tucker says, Tr. p. 45) “The front wheels of the truck were just about on the main track, and *then my only thought was to put on speed and see if I could get across in front of it.*”



Here we respectfully direct the attention of the Court to the following particularly apt excerpt from the opinion of the case of *Pepper vs. Southern Pacific Co.*, 105 Cal. 389:

“It is said, however, that the train was running at a rate of speed faster than usual. This could not affect the question, since the deceased could not have been misled by the unusual speed of the train, unless he saw or heard the train and undertook to cross ahead of it; *and to make such attempt and fail is conclusive evidence of negligence.*”

Upon the oral argument counsel for defendants in error emphasized three propositions, namely:

1. That the negligence of Tucker was not imputable to Wright;

2. That the question of contributory negligence is one of substantive law concerning which the decisions of the State Courts are not binding upon the Federal tribunals, and that in the Federal Courts the question of contributory negligence is always one of fact for the jury and is never a matter of law; therefore, that the Court below was not in error in denying the motion of plaintiff in error for a nonsuit, or a directed verdict in its favor; and

3. That the Court below was in error in eliminating from the consideration of the jury the so-called “last clear chance” doctrine; that a case should not be reversed because the jury has disregarded an erroneous instruction; and, we assume,

counsel concludes (although not so stated), that the Court may conjecture that the verdict was based by the jury upon an instruction contrary to that which was given, and should, therefore, justify the verdict on the omitted instruction.

To these we will reply in the order named.

1. *That the negligence of Tucker was not imputable to Wright.*

Little can be added to our former brief upon this point, except to direct the attention of the Court to the undisputed fact that Wright had rented the truck and was paying the rental for it. He had rented it the previous day and for the day of the accident (Tr. p. 43). Tucker was “demonstrating the truck to Mr. Wright, and *was also doing some work for him.*” (Tr. p. 43). “Prior to the time of the accident that morning we had hauled one load of raisins to Del Rey.” “Mr. Wright had been riding with me on this truck during that morning up to the time of the accident.” (Tr. p. 33).

In other words Wright had rented the truck for his own business and the truck had been so used during one whole day and a portion of the next—hauling Wright’s raisins—and Tucker was the driver, and Wright and Tucker were certainly engaged in a joint or common enterprise, and notwithstanding Tucker’s statement that Wright had nothing to do with the physical or mechanical operation of the truck, it is nowhere denied, and could not

well be, that Wright had the absolute right to say to Tucker where and when he should drive it. It therefore seems to us that, as a matter of law, Tucker's negligence was imputable to Wright.

2. *That the question of contributory negligence is one of substantive law concerning which the decisions of the State Court are not binding upon the Federal tribunals, and that in the Federal Courts the question of contributory negligence is always one of fact for the jury, and is never a matter of law; therefore, that the Court below was not in error in denying the motion of plaintiff in error for a non-suit, or a directed verdict in its favor.*

With counsel's first premise that the question of contributory negligence is one of substantive law, concerning which the decisions of the State Courts are not binding upon the Federal tribunals, we have no quarrel. With his second premise, namely, that in the Federal Courts the question of contributory negligence is always one of fact and is never a matter of law, we take decided issue. Reliance is placed by counsel upon two cases, namely, *Jones vs. East Tennessee Ry. Co.*, 128 U. S. 443, and *Grand Trunk Ry. Co. vs. Ives*, 144 U. S. 408. As stated on page 37 of the brief: "Upon the authorities cited heretofore, and especially upon the authority of *Jones vs. East Tennessee Ry. Co.*, the question of the negligence of the deceased was a proper question for the jury, and it would have been error for the Court to have taken that question from the jury."

In neither case can we find anything which should afford comfort to opposing counsel.

The Jones case was decided in 1888; it was not a crossing case; the evidence conflicting. As the Court itself said:

“The plaintiff himself states that he was in the depot of the defendant on business; that the passenger platform was alongside the tracks, which ran between it and the depot; there was also a sidetrack that went through the depot; that he passed out of the depot by the usual way, and was struck between the wall of the depot and the platform. He further says that the way he was going he could not see a train approaching from the east because there was a car on the side-track, and he had no warning of any approaching train, although he listened as he went out of the depot. There is also some evidence that there was so much noise about the place of exit from the depot that the sound of the advancing train could not be distinguished. On the other hand, there is some testimony to show that the plaintiff ran carelessly through the depot; that he knew the train was approaching, and that he might have guarded himself against it if he had stopped at the exit of the depot long enough to have looked about him.”

The mere recital of these facts shows that reasonable men might fairly differ upon the question as to whether Jones was negligent, and the Supreme Court was clearly right in holding that the determination of that question was for the jury.



In the Ives case the Court reiterates the accepted principle that:

“When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the Court.”

The lower Court and the Supreme Court permitted the Ives case to go to the jury as to contributory negligence of Ives on the theory that reasonable men might fairly differ as to whether or not there was negligence. The facts of that case were such that it might almost be said *without question* that reasonable men might differ as to negligence.

The road on which Ives traveled toward the track was on an up-grade; the view was obstructed until Ives reached a point 15 to 20 feet of the track; he would have to stop his horses within 8 feet of the track before he could see in both directions; there were other railroads than defendant running side by side with it; another train of one of the other railroads was actually approaching and passing when Ives reached the tracks; there was noise and confusion, and possibly noise and confusion of signals; Ives stopped before driving onto the track, presumably to listen for trains; and while watching

a passing train of another road he was struck by a train of defendant.

In this obstructed, confused and dangerous situation, it might reasonably be held that Ives stopped his horses at the safest place in which he could do so, and that he exercised all the care that was incumbent upon him; therefore, the fact that in that case the Court said the question of contributory negligence was for the jury does not appear to affect the contention that in the present case the question is *not* for the jury. Even in the Ives case the Court cites with approval *Pierce on Railroads*, page 343, to the effect that a traveler upon a highway approaching a railroad crossing ought to make vigilant use of his senses of sight and hearing in order to avoid a collision, and should listen for signals and look in the different directions from which a train may come, and that if by neglect of this duty he suffers injury from a passing train he cannot recover from the company.

Wright neglected every duty incumbent upon him when about to cross a railroad track; the view was absolutely unobstructed for at least 145 ft. before he reached the track; there was no confusion of passing trains or other vehicles; there was no other confusion of sound; there was no emergency to distract his attention; he had but to lift his eyes to see the approaching danger; he had to cross two switch tracks before he came to the main track.

In the Ives case, the Court states the rule that where the facts are such that all reasonable men must draw the same conclusion from them, then the question of negligence is one of law for the Court. If the instant case is not based on facts such that all reasonable men must draw the same conclusion as to Wright's negligence, then we personally cannot conceive of the existence of such a case and the rule cited in the Ives case is mere verbiage.

Neither the Jones case nor the Ives case pretends to discard the principle enunciated in *Railroad Co. vs. Houston*, 95 U. S. 702, where the Court (at page 702) says:

“But, aside from this fact, the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employes in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the

defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case we cannot see any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances, the Court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant."

or to overrule the case of *Schofield vs. Chicago & St. Paul Ry. Co.*, 114 U. S. 615, where, at page 617, the opinion states:

"The ground upon which the Circuit Court directed a verdict for the defendant, 2 McCrary, 268, was, that the plaintiff, by his own showing, was guilty of contributory negligence, whatever negligence there may have been on the part of the defendant. Applying the test, that, if it would be the duty of the Court, on the plaintiff's evidence, to set aside, as contrary to the evidence, a verdict for the defendant, if given, the Court had authority to direct a verdict for the defendant, it considered the case under the rules laid down in *Continental Improvement Co. vs. Stead*, 95 U. S. 160, and especially in *Railroad Co. vs. Houston*, Id. 697, and arrived at the conclusions of law, that neither the fact that the train was not a regular one, nor the fact of its high rate of speed, excused the plaintiff from the duty of looking out for a train; that the fact that it did not stop at the depot could avail the plaintiff only on the view that, hearing a whistle from it, as it was south of the depot, he supposed it would stop there, and so failed to look, but that, in such case, he



would have been negligent, because it was not certain the train would stop at the depot, and he would have had warning that a train was approaching; that the neglect of the train to blow a whistle or ring a bell between the depot and the crossing did not relieve the plaintiff from the duty of looking back, at least as far as the depot, before going on the track; and that, in view of the duty incumbent on the plaintiff to look for a coming train before going so near to the track as to be unable to prevent a collision, and of the fact that he was at least 100 feet from the crossing when the train passed the depot, and could then have seen it if he had looked, and have avoided the accident by stopping until it had passed by, he was negligent in not looking.

These conclusions of law approve themselves to our judgment, and are in accordance with the rules laid down in the cases referred to. In *Railroad Co. vs. Houston*, it was said: 'The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employes in these particulars, was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass,

and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant.' The Court added, that an instruction to render a verdict for the defendant would have been proper.

These views concur with those laid down by the Supreme Court of Minnesota, in *Brown vs. Milwaukee Railway Co.*, 22 Minn. 165, and are in accord with the current of decisions in the courts of the States.

It is the settled law of this Court, that, when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the Court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Improvement Co. vs. Munson*, 14 Wall. 442; *Pleasants vs. Fant*, 22 Id. 116; *Herbert vs. Butler*, 97 U. S. 319; *Bowditch vs. Boston*, 101 Id. 16; *Griggs vs. Houston*, 104 Id. 553; *Randall vs. Baltimore & Ohio Railroad Co.*, 109 Id. 478; *Anderson County Comrs. vs. Beal*, 113 Id. 227; *Baylis vs. Travellers' Insurance Co.*, Id. 316. This rule was rightly applied by the Circuit Court to the present case."

Be that as it may, the later decisions of the United States Supreme Court are in strict accord with the statement of the law for which we are contending. In that connection we quote from the following cases:

"We are of opinion that the deceased was guilty of contributory negligence, such as to bar any recovery. It is true that questions of negligence and contributory negligence are, ordinarily, questions of fact to be passed upon by a

jury; yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict. *Railroad Co. vs. Houston*, 95 U. S. 697; *Schofield vs. Chicago, Milwaukee & St. Paul Railroad*, 114 U. S. 615; *Delaware, Lackawanna & Railroad Co. vs. Converse*, 139 U. S. 469; *Aerkfetz vs. Humphreys*, 156 U. S. 418."

*Elliott vs. Chicago, Milwaukee & Railway Co.*, 150 U. S. 245 (at p. 246).

"For several hundred feet on either side of the highway crossing there was a cut of about eight feet below the surface of the surrounding country, through which the railway ran. The highway approached the crossing by a gradual decline, the length of which was from 130 to 150 feet. Along the greater portion of this distance the view of a train approaching, either from the north or the south, was cut off by the banks of the excavation on either side of the highway; but at a distance of about forty feet before reaching the track the road emerged from the cut, and the view up the track for about 300 feet was unobstructed.

At the time of the accident, Freeman was driving along the highway, going eastward from the town of Elma in a farm wagon drawn by two horses at a slow trot. He was a man thirty years of age, with no defect of eyesight or hearing, and was familiar with the crossing, having frequently driven the same team over it. The horses were gentle and were accustomed to the cars.

The duty of a person approaching a railway crossing, whether driving or on foot, to look and listen before crossing the track, is so elementary and has been affirmed so many times by this

Court, that a mere reference to the cases of *Railroad Company vs. Houston*, 95 U. S. 697, and *Schofield vs. Chicago & St. Paul Railway Co.*, 114 U. S. 615, is a sufficient illustration of the general rule."

\* \* \* \* \*

"So far, then, as there was any oral testimony upon the subject, it tended to show that the deceased neither stopped, looked nor listened before crossing the track, and there was nothing to contradict it. Assuming, however, that these witnesses, though uncontradicted, might have been mistaken, and that the jury were at liberty to disregard their testimony and to find that he did comply with the law in this particular, we are confronted by a still more serious difficulty in the fact that if he had looked and listened he would certainly have seen the engine in time to stop and avoid a collision. He was a young man. His eyesight and hearing were perfectly good. He was acquainted with the crossing, with the general character of the country, and with the depth of the excavation made by the highway and the railway. The testimony is practically uncontradicted that for a distance of forty feet from the railway track he could have seen the train approaching at a distance of about 300 feet, and as the train was a freight train, going at a speed not exceeding twenty miles an hour, he would have had no difficulty in avoiding it. When it appears that if proper precautions were taken they could not have failed to prove effectual, the Court has no right to assume, especially in the face of all the oral testimony, that such precautions were taken. The comments of Mr. Justice Field in *Railroad Company vs. Houston*, 95 U. S. 697, 702, are pertinent in this connection: 'Negligence of the company's employes in these particulars' (fail-



ure to whistle or ring the bell) 'was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant.'

If, in this case, we were to discard the evidence of the three witnesses entirely, there would still remain the facts that the deceased approached a railway crossing well known to him; that the train was in full view; that, if he had used his senses, he could not have failed to see it; and that, notwithstanding this, the accident occurred. Judging from the common experience of men, there can be but one plausible solution of the problem how the collision occurred. He did not look; or if he looked, he did not heed the warning, and took the chance of crossing the track before the train could reach him. In either case he was clearly guilty of contributory negligence.

*The cases in this court relied upon by the plaintiffs are all readily distinguishable, either by reason of the proximity of obstructions interfering with the view of approaching trains, confusion caused by trains approaching simultaneously from opposite directions or other peculiar circumstances tending to mislead the in-*

*jured party as to the existence of danger in crossing the track.* (Italics ours.)

Upon the whole, we are of opinion that the testimony tending to show contributory negligence on the part of the deceased was so conclusive that nothing remained for the jury, and that the defendant was entitled to an instruction to return a verdict in its favor."

*Northern Pacific R. R. Co. vs. Freeman,*  
174 U. S. 379.

The language of the italicized portion of this opinion is significant. It has direct application to the facts of the Jones and Ives cases upon which defendants in error so strongly rely. In the present case there were no obstructions interfering with the view of approaching trains, there was no confusion caused by trains approaching simultaneously from opposite directions, there was no unusual noise, there were no peculiar circumstances tending to mislead either Wright or Tucker as to the existence of danger in crossing the track. If either had looked as late as the moment when they were going upon the first or even second switch track they would have seen the train and the accident would have been avoided.

In this connection it might be well to briefly notice counsel's position that because Wright and Tucker looked at a point 145 feet from the crossing, and could then see no train for a distance of 1600 feet *because no train was there*, and that they therefore acted as reasonably prudent men in that they knew

that the ordinance of Selma prescribed a train speed limit of 8 miles an hour, and that if that ordinance were not violated they would have ample time to cross the track before a train would arrive at the crossing. That is, they had 145 feet to go, traveling 4 miles an hour, and the train 1600 feet to go, traveling at not more than 8 miles an hour. The fallacy of counsel's argument is best illustrated by the following statement appearing on page 17 of his brief:

“But we do contend that an ordinary prudent man would not only have a right to assume, but would ordinarily assume that no train would be operated at that place and under those circumstances at such a reckless rate of speed as 42 miles or even 30 miles per hour. If the train had been operated at 12 or 15, or possibly 20 miles per hour, a reasonable man might have expected the same, but to say that any reasonable man would expect a heavy train to be permitted to go recklessly through a part of a city (where there were numerous crossings being used by the public), without ringing a bell or sounding a whistle, and the steam shut off so that the train made practically no noise, would, as it seems to us, be equivalent to saying that reasonable men must believe that operators of railroad trains are not only persistently and wantonly negligent, but that they are so wantonly and wilfully negligent as to be in such cases criminals. This a reasonable man cannot be expected to assume or believe. It would seem therefore that the question of exactly where and when the driver of this truck should have observed the track of the railroad from whence the train came, was a question proper to be submitted to the jury if that question had been an issue at all in this case.”

It is not the law of California, nor that laid down by the Supreme Court of the United States for application by the Federal Courts, that a person approaching a railroad crossing is authorized to assume that a person operating a train will not be negligent in that operation.

We quote from the case of *Huston vs. Southern California Ry. Co.*, 150 Cal. 703, where it is said:

“It is not the law of this State that a person approaching a railroad crossing is authorized to assume that the person operating a train will not in any way be negligent in that operation. This doctrine has been asserted in some of the states, but is opposed to the law as laid down in the decisions of this State and of the Supreme Court of the United States. Such a rule would abrogate the doctrine of contributory negligence in all such cases.”

In that case the Court points out that the rule adopted is that obtaining in the Supreme Court of the United States and in the Federal Courts generally, and is therefore binding here.

The principle is approved in the case of *Thompson vs. Southern Pacific Co.*, 161 Pac. 21, referred to on pp. 60 to 63 of our brief herein.



3. *That the Court below was in error in eliminating from the consideration of the jury the so-called "last clear chance" doctrine; that a case should not be reversed because the jury has disregarded an erroneous instruction; and, we assume, counsel concludes (although not so stated), that the court may conjecture that the verdict was based by the jury upon an instruction contrary to that which was given, and should, therefore, justify the verdict upon the omitted instruction.*

This contention of counsel for defendants in error is based upon the erroneous assumption that the Court was bound to adopt the doctrine that the "last clear chance" applied not only where the trainmen *actually knew* of the perilous position of the traveler, but also where, *by the exercise of proper care, they should have known thereof.*

Counsel admits (Brief, p. 45) that the decisions of the courts of different jurisdictions are conflicting. There is no fixed rule in the United States Courts. The Ives case, 144 U. S. 408, did not involve the doctrine, and is not even touched upon by the Court except in a statement of the general rule concerning contributory negligence and its qualification (p. 429). The opinion does not even pretend to define the doctrine, or to include its elements.

The *Inland etc. Coasting Co. vs. Tolson*, 139 U. S. 551, does not discuss the distinction. The expression simply is—"yet the contributory negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown

that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence."

It clearly appears in that case that the employes of the steamship company had actual knowledge of Tolson's dangerous position, and it was with respect to that fact that the language of the Court was employed. It cannot, therefore, be considered as authority for the position of defendants in error. The Court below simply adopted the rule enunciated in Section 238 of White's Supplement to Thompson's Commentaries on the Law of Negligence, as follows:

"Most American courts subject the rule that there can be no recovery by an injured person where his own negligence contributes in any degree to the immediate cause of the injury to the qualification that the person causing the injury was *without knowledge* of the perilous position of the injured person in time to avoid the injury by the exercise of ordinary care."

This is also the unquestioned rule in California.

*Waterman vs. Visalia Electric R. R. Co.*, 23 Cal. App. 350;

*Tucker vs. United Railroads*, 171 Cal. 703;

*Starck vs. Pacific Electric Ry. Co.*, 172 Cal. 281,

which rule the Court was required to adopt. There being, therefore, no evidence that the trainmen actually discovered the deceased in a position of peril, the doctrine of "last clear chance" had no appli-

cation and the Court was correct in so instructing the jury.

Furthermore, the "last clear chance" doctrine cannot be invoked where the negligence of the parties is concurrent and that of the person injured continues up to the time of the accident.

*Callery vs. Morgan's L. & T. R. & S. S. Co.*,  
72 So. 222;

*Dyerson vs. Union Pac. R. R. Co.*, 7 L. R. A.  
(N. S.) 132, and note;

*Holmes vs. South Pacific Coast Ry. Co.*, 97  
Cal. 161;

*Stephenson vs. Parton*, 155 Pac. Rep. 147.

It is clear in this case that the negligence of both Wright and Tucker continued up to the very time of the accident. Therefore the Court was right in instructing the jury that the "last clear chance" doctrine did not apply.

But, even if it is assumed that the Court erred in giving the instruction in question, what is the effect? It does not appear that the jury disregarded it. The presumption must be that they followed the instruction, as it was their sworn duty to do. In this case the defendants in error have no fault to find with the verdict. Plaintiff in error is complaining, but not because this alleged erroneous instruction was given. Defendants in error are in no position to avail themselves of the error, if error was committed. It would be a harsh rule which would im-

pose upon the plaintiff in error in this case the penalty of a large verdict of \$12,000.00 on the assumption that the jury disregarded an erroneous instruction when there is absolutely no evidence in the record to justify such assumption, and there is no law to warrant such assumption. In fact, all presumptions are to the contrary. The doctrine of "last clear chance" was by the Court eliminated from the consideration of the jury. The jury simply held that the plaintiff in error was negligent and that the deceased was guilty of no contributory negligence. This Court should not speculate upon the subject, but should presume that the jury performed its sworn duty to abide by the instructions of the Court, and decided the case in accordance with such instructions.

*Abalas vs. Consolidated Const. Co.*, 164 Pac. Rep. 19.

For aught that appears in this case it may well be that the instruction referred to was given by the Court at the request of the defendants in error. Certainly it does not appear from the record that the defendants in error took any exception to the giving of the instruction, and as all intendments are in favor of the action of the Court it will be presumed upon appeal that the instruction was either given at the request of the defendants in error, or if it were given by the Court on its own motion, or at the request of the plaintiff in error, that defendants in error took no exception thereto.



See

*Sewell vs. Price*, 164 Cal. 265;

*Estate of Gamble*, 166 Cal. 253.

“On appeal all intendments are in favor of regularity of action of the trial court. Error will never be presumed but must affirmatively appear.”

*People vs. Douglas*, 100 Cal. 1.

We respectfully submit—

1. That Tucker's negligence was imputable to Wright;
2. That Wright was himself negligent;
3. That the negligence of either Tucker or Wright, or both, contributed to the accident, and was the proximate cause thereof;
4. That such negligence existed in this case as a matter of law, and that the Court should have granted the motion for a non-suit, or a directed verdict in favor of plaintiff in error;
5. That the “last clear chance” doctrine has no application here, and the Court correctly so instructed the jury; and that, even if the Court was in error, such error cannot be availed of by defendants in error.

It is therefore respectfully submitted that the judgment should be reversed.

L. L. CORY,

ELMER WESTLAKE,

*Attorneys for Plaintiff in Error.*

San Francisco Law Library.  
United States

# Circuit Court of Appeals

For the Ninth Circuit.

MAH SHEE, by CHAN LEUNG,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration  
at the Port of San Francisco, California,  
Appellee.

## Transcript of Record.

Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
First Division.

San Francisco Law Library.



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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MAH SHEE, by CHAN LEUNG,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration  
at the Port of San Francisco, California,  
Appellee.

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Transcript of Record.

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Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
First Division.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Assignment of Errors .....	19
Attorneys, Names and Addresses of.....	1
Citation on Appeal—Copy .....	24
Citation on Appeal—Original .....	33
Certificate of Clerk U. S. District Court to Transcript on Appeal .....	32
Certificate of Clerk U. S. District Court as to Original Exhibits .....	34
Demurrer to Petition for Writ of Habeas Cor- pus .....	15
Extracts from Immigration Record.....	25
Minutes of Hearing on Order to Show Cause..	14
Names and Addresses of Attorneys.....	1
Notice of Appeal .....	17
Order Allowing Petition for Appeal.....	22
Order Extending Time to Docket Case.....	30
Order Extending Time to Docket Case.....	31
Order Respecting Withdrawal of Immigration Record .....	29
Order Sustaining Demurrer to Petition for a Writ of Habeas Corpus and Denying Peti- tion for Writ .....	16
Order to Show Cause .....	13

Index.	Page
Petition for Appeal .....	18
Petition for Writ .....	3
Praeceptum for Transcript on Appeal.....	1
Stipulation and Order Respecting Withdrawal of Immigration Record .....	28

*In the Southern Division of the District Court of the  
United States, Northern District of California,  
First Division.*

No. 16,118.

In the Matter of MAR SHEE, on Habeas Corpus.

**Names and Addresses of Attorneys.**

For the Detained and Appellant: GEO. A. McGOWAN, Esq., San Francisco.

For the Respondent and Appellee: U. S. ATTORNEY, San Francisco, Cal.

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*District Court of the United States, in and for the  
Northern District of California, Southern Division,  
First Division.*

No. 16,118.

In the Matter of the Application of MAH SHEE,  
on Habeas Corpus.

**(Praeceptum for Transcript on Appeal.)**

To the Clerk of Said Court:

Sir: Please make up Transcript of Appeal in the above-entitled case, to be composed of the following papers, to wit:

1. Petition for Writ of Habeas Corpus.
2. Order to Show Cause.
3. Demurrer to Petition.
4. Minute Order Regarding Immigration Record.
5. Judgment and Order Dismissing Order to Show Cause and Denying Petition for Writ.
6. Notice of Appeal.
7. Petition for Appeal.



8. Assignment of Errors.
9. Order Allowing Appeal.
10. Citations on Appeal—Original and Copy.
11. Order Extending Time to Docket Case.
12. Stipulation and Order Regarding Immigration Record.
13. Pages 59 to 61, inclusive, from Immigration Record.
14. Clerk's Certificate.

GEO. A. MCGOWAN,  
Attorney for Petitioner.

Due service and receipt of a copy of the within praecipe is hereby admitted this 15th day of January, 1917.

JNO. W. PRESTON,  
U. S. Attorney, Northern District of California,  
Attorney for Respondent.

[Endorsed]: Filed Jan. 15, 1917. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [1\*]

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*In the District Court of the United States, in and  
for the Northern District of California, South-  
ern Division, First Division.*

No. 16,118.

In the Matter of the Application of MAH SHEE,  
on Habeas Corpus.

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\*Page-number appearing at foot of page of original certified Transcript of Record.

**Petition for Writ.**

To the Honorable MAURICE T. DOOLING,  
United States District Judge, in and for the  
Northern District of California, First Division:

It is respectfully shown by the petition of Chan Leung—

That Mah Shee, hereinafter in this petition referred to as the “detained,” is unlawfully imprisoned, detained, confined and restrained of *his* liberty by Edward White, Commissioner of Immigration for the Port of San Francisco at the Immigration Station at Angel Island, County of Marin, State and Northern District of California, Southern Division thereof; that said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to wit:

That it is claimed by the said Commissioner that the said detained is a Chinese person and an alien not subject or entitled to admission into the United States under the terms and provisions of the Acts of Congress of May 6th, 1882, July 5th, 1884, November 3d, 1893, and the Act of Congress of April 29th, 1902, as amended and re-enacted by Section 5 of the Deficiency Act of April 7th, 1904, which said acts are commonly known and referred to as the Chinese Exclusion or Restriction Acts; and that he, the said Commissioner, intends to deport the said detained away from and out of the United States to the Republic of China. [2]

That the said Commissioner claims that the said detained arrived at the Port of San Francisco on or

about the 16th day of August, 1916, on the steamship "Tenyo Maru" and thereupon made application to enter into the United States as the wife of a native born citizen thereof, that is to say, as the wife of your petitioner, who is a native-born citizen of the United States and who accompanied his wife, the said detained, from China to the Port of San Francisco upon the said steamship, and that your petitioner was thereupon permitted to re-enter the United States as a native-born citizen thereof; and that the application of the said detained to enter the United States as such wife of a native-born citizen thereof was denied by the said Commissioner of Immigration, and that appeal was thereupon taken from the excluding decision of the said Commissioner of Immigration to the (Secretary of the Department of Labor) and that the said Secretary thereafter dismissed the said appeal. That it is admitted that the said detained was admissible to the United States under the General Immigration laws thereof, and that she is a Chinese family woman of respectability. That it is claimed by the said Commissioner that the said detained was accorded a full and fair hearing; that the action of the said Commissioner and said Secretary was taken and made by them in the proper exercise of the discretion committed to them by the statutes in such cases made and provided and in accordance with the regulations promulgated under the authority contained in said statutes.

But, on the contrary, your petitioner, on his information and belief alleges that the hearing and pro-

ceedings had herein and the action of the said Commissioner and the action of the said Secretary was and is in excess of the authority committed to them by said rules and regulations and by said statutes and that the denial of the application of the said detained to enter into the United States as the wife of a native-born citizen thereof, was and is an abuse of [3] the authority committed to them by the said statutes in each of the following particulars hereinafter set forth:

First. That the evidence submitted upon the application of the said detained to enter the United States was of such a conclusive kind and character, and was of such legal weight and sufficiency that it was an abuse of discretion upon the part of the said Commissioner and the said Secretary not to be guided thereby and it was further an abuse of discretion as aforesaid upon the part of the said officers to refuse to accept the said testimony and the report and recommendation of the Examining Immigration Inspector before whom alone appeared the applicant and your petitioner in said case, and before whom the applicant and your petitioner gave their testimony herein. That the said Immigration Inspector was directed to hear the said case by orders of the said Commissioner, and the said detained and your petitioner having appeared before the said Inspector, and the said Inspector having heard the said detained and your petitioner and taken their testimony by question and answer, and having the opportunity of observing their manner and conduct, while under examination, and having



seen and observed the same, and having reported herein that the demeanor of the said witnesses was satisfactory, and that none of them were discredited before the Immigration Service, and having found from all the evidence so taken by him as aforesaid that the said detained was entitled to admission into the United States as the wife of a native-born citizen thereof, that it was an abuse of discretion for the said Commissioner, who did not have the said detained or your petitioner before him, and had not the opportunities for judging of their credibility, as had the Inspector, to set aside the report and recommendation of the said Inspector and deny the application [4] of the said detained to enter the United States, and it was further an abuse of discretion for the reasons aforesaid for the said Secretary of Labor to affirm the said excluding decision of the said Commissioner, and to refuse to be guided by the report and recommendation of the said Inspector before whom alone, of said officers, the applicant and your petitioner appeared and gave their testimony, and your petitioner therefore alleges, upon his information and belief, that the said detained is so illegally restrained of her liberty for the reason aforesaid, and the said adverse action of the said Commissioner, and the said Secretary, was, your petitioner alleges upon his information and belief, arrived at and done in denying the said detained the fair hearing and consideration of her case to which she was entitled, and your petitioner further alleges upon his information and belief that the action of the said Commissioner and the said Sec-

retary of Labor, in thus disregarding the said evidence, was done in excess of the discretion committed to them by the acts hereinbefore mentioned, and in violation of the constitutional rights of the said detained as the wife of a native-born citizen of the United States, and your petitioner further alleges upon his information and belief that had the same testimony as was presented herein upon behalf of the said detained, been presented upon behalf of a person of any other race than the Chinese, that the said evidence would not have been so disregarded, and disrated, and your petitioner further alleges, therefore, that the action of the said Secretary of Labor was influenced against the said detained and her said witnesses solely because of their being of the Chinese race, and in disregard of the fact that the husband of the detained is conceded to be a citizen of the United States by the said Commissioner of Immigration and the [5] said Secretary of Labor, and your petitioner therefore alleges that the discrimination mentioned was both unjust and illegal.

Second. That the hearing accorded said detained before the said Commissioner and the said Secretary was not a full or a fair hearing, but on the contrary the right of the said detained to be represented by counsel was unduly infringed upon in such a way and manner as to prevent the said detained from presenting all of the evidence possible of submission upon her behalf before the said Commissioner and the said Secretary, and in this particular your petitioner alleges that upon the denial of the case of the said detained by the said Commissioner that the said

detained, through her attorney, filed a written request with the said Commissioner, which said written request was dated September 18, 1916, requesting that the report and recommendation of the Examining Inspector and of the reviewing officer of the Law Section be opened to the inspection of the attorney for the said detained, so that the said detained, through her attorney, might make answer thereto by evidence or argument before the said Commissioner and the said Secretary of the Department at a time when it would be in the power of the said detained to submit additional evidence in support of her said appeal, and that said report or review of the Examining Inspector and the law officer were open to the inspection of the attorneys practicing before the Department at Washington, your petitioner contending that these reports should be open to the inspection of your petitioner and the detained and their attorney at a time when he could make answer thereto by evidence or argument as may be deemed necessary, but that the said Commissioner of Immigration did in a written communication, under date of September 19th, 1916, deny said request, and by virtue of the said denial prevented the said detained from submitting evidence on her behalf showing her [6] right to enter the United States, and thus prevented her having a full and fair hearing of her said application to enter the United States.

Your petitioner further alleges that upon the 20th day of September, 1916, the said detained and your petitioner, through their attorney, caused to be filed a written application to the said Secretary request-



ing that the said attorney be permitted an interview with his client, the detained in this matter, that her said husband, with whom she had journeyed from China to this country, so that the said detained might have an opportunity of submitting additional evidence on behalf of her application to enter the United States, but that the said application was denied by the said Commissioner in a written communication dated September 25th, 1916, wherein the right of counsel of the said detained was unduly curtailed and so limited in its application as to prevent and deprive the said detained of any real substantial benefit of counsel, and in this particular your petitioner alleges that the said detained does not speak the English language, and that it was necessary for the said attorney to have an interpreter in order to confer with the said detained, and that your petitioner, as husband of the said detained, would have acted in that capacity, and the action of the Commissioner in preventing and depriving the said detained of the right to confer with her counsel, and to prevent and deprive her of any knowledge as to why her case had been denied, and thus preventing her a fair opportunity of submitting additional evidence upon behalf of her appeal, was an unjust discrimination that deprives said detained of her liberty without due process of law.

Your petitioner further alleges that upon the 27th day of September, 1916, he caused a written request to be filed with the said Commissioner asking permission that the said detained, who [7] journeyed from China to the port of San Francisco with



your petitioner, her husband, be allowed to be visited by your petitioner, so that he might be permitted to see, talk to, confer with and console and comfort his wife, the said detained, but that the said Commissioner denied said request, and your petitioner alleges that ever since the arrival of his wife, the said detained, at the port of San Francisco, up and to the present time, she has been kept in close detention and custody by the said Commissioner, and held *incommunicado*, not knowing and not being informed as to why her application to enter the United States had been denied, thus preventing any and all opportunity of submitting evidence upon her own behalf in support of her said appeal in her endeavor to gain admission to the United States as the wife of your petitioner. That your petitioner has in his possession a copy of all the testimony given in said matter, together with a copy of the letters addressed to the Commissioner, herebefore referred to, and the original of the answers from the Commissioner, herebefore referred to, and that all of said papers, documents and testimony which are in the possession of your petitioner are submitted herewith under a separate cover, and are hereby referred to with the same force and effect as has been set forth herein. That your petitioner has not a copy of the proceedings of the said case which took place before the said Secretary of Labor at Washington, and that there is no copy of said proceedings now within the jurisdiction of this Court, and it is therefore impossible for your petitioner to procure a copy thereof to submit with this petition in time to prevent the deportation here-

inbefore and hereafter referred to.

That it is the intention of the said Commissioner to deport the said detained away from and out of the United States by the steamer "Nippon Maru," sailing from the port of San Francisco upon [8] the 25th day of November, 1916, at one o'clock P. M. and unless this Court intervenes and stays said deportation, the said detained will be deprived of her right to enter the United States and join her husband, your petitioner, and take up her residence with her husband within the United States.

That your petitioner verifies this petition for and upon behalf of his wife, the said detained, and upon his own behalf as the husband of the said detained, for the reason that the said detained is held *incommunicado*, in close custody and confinement, and has been deprived of the right to see and consult her attorney, and see or be seen by her husband, and hence is unable to verify said petition upon her own behalf.

WHEREFORE, your petitioner prays that a writ of *habeas corpus* may be issued herein, directed to the said Commissioner of Immigration, directing him to produce the body of the said detained, together with the time and cause of her detention before this Honorable Court at a time and place to be specified in said order, together with such further and other relief as to the Court may seem proper in the premises, and that the said detained may be restored to her liberty and permitted to take up her domicile in the United States as the wife of your

petitioner, and that she go hence without day.

CHAN (Chinese Characters) LEUNG,  
Petitioner.

GEO. A. McGOWAN,  
Attorney for Petitioner, Bank of Italy Building,  
San Francisco, California. [9]

UNITED STATES OF AMERICA.

State and Northern District of California,  
City and County of San Francisco,—ss.

Chan Leung, being first duly sworn, deposes and  
says:

That he is the petitioner named in the foregoing  
petition; that the same has been read and explained  
to him and he knows the contents thereof; that the  
same is true of his own knowledge except as to those  
matters which are therein stated on his information  
and belief, and as to those matters he believes it to  
be true.

CHAN (Chinese Characters) LEUNG.

Subscribed and sworn to before me this 24 day of  
November, 1916.

[Seal] THOMAS S. BURNES,  
Notary Public in and for the City and County of San  
Francisco, State of California.

(CHINESE PICTURE.)

Photograph of Petitioner.

Due service and receipt of a copy of the within  
Petition and Order is hereby admitted this 24 day  
of Nov., 1916.

JNO. W. PRESTON,  
U. S. Attorney, Northern District of California,  
Attorney for Respondent.

[Endorsed]: Filed Nov. 24, 1916. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [10]

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*In the District Court of the United States, in and for  
the Northern District of California, Southern  
Division, First Division.*

No. 16,118.

In the Matter of the Application of MAH SHEE on  
Habeas Corpus.

**Order to Show Cause.**

Good cause appearing therefor and upon reading the verified petition on file herein, it is hereby ordered that Edward White, Commissioner of Immigration for the Port and District of San Francisco, appear before this Court on the 29 day of November, 1916, at the hour of 10 o'clock, A. M. of said day, to show cause, if any he has, why a writ of *habeas corpus* should not be issued as prayed for; and that a copy of this order be served upon the said Commissioner, and a copy of said petition upon the United States Attorney.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration, as aforesaid, or whoever, acting under the orders of said Commissioner, or the Secretary of Labor, shall have the custody of the said Mah Shee, are hereby ordered and directed to retain the said person within the custody of the said Commissioner of Immigration and within the jurisdiction of this Court until its further order herein.



Dated San Francisco, California, November 24, 1916.

M. T. DOOLING,  
United States District Judge.

[Endorsed]: Filed Nov. 24, 1916. W. B. Maling,  
Clerk. By Lyle S. Morris, Deputy Clerk. [11]

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At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 9th day of December, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable MAURICE T. DOOLING, District Judge, et al.

No. 16,118.

In the Matter of MAH SHEE, on Habeas Corpus.

**(Minutes of Hearing on Order to Show Cause.)**

This matter came on regularly this day for hearing on the order to show cause as to the issuance of a writ of *habeas corpus* herein. Geo. A. McGowan, Esq., was present as Attorney for the petitioner and detained. C. A. Ornbaun, Esq., Assistant United States Attorney, was present on behalf of respondent and presented and filed Demurrer to the petition for writ of *habeas corpus* and by consent of attorney for detained, the Court ordered that the Immigration Records, likewise presented, be filed and marked as Respondent's Exhibit "A" and "B" and that the same be considered as a part of the said original peti-

tion. Said matter was then argued by counsel for respective parties and submitted. [12]

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*In the Southern Division of the United States District Court for the Northern District of California, First Division.*

No. 16,118.

In the Matter of the Application of MAH SHEE on Habeas Corpus.

**Demurrer to Petition for Writ of Habeas Corpus.**

Now comes the respondent, Edward White, Commissioner of Immigration at the Port of San Francisco, in the State and Northern District of California, and demurs to the petition for a writ of *habeas corpus* in the above-entitled cause and for grounds of demurrer alleges

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of *habeas corpus*, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of *habeas corpus* be denied.

JOHN W. PRESTON,  
United States Attorney,  
CASPER A. ORNBAUN,  
Asst. United States Attorney,  
Attys. for Respondent.

Copy received. Dec. 9, 1916.

GEO. A. MCGOWAN,

Atty. for Pet.

[Endorsed]: Filed Dec. 9th, 1916. W. B. Maling,  
Clerk. By Lyle S. Morris, Deputy. [13]

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*In the Southern Division of the United States Dis-  
trict Court, for the Northern District of Cali-  
fornia, First Division.*

No. 16,118.

In the Matter of MAH SHEE, on Habeas Corpus.

**(Order Sustaining Demurrer to Petition for a Writ  
of Habeas Corpus and Denying Petition for  
Writ.)**

GEORGE A. MCGOWAN, Esq., Attorney for  
Petitioner.

JOHN W. PRESTON, Esq., United States At-  
torney and CASPER A. ORNBAUN, Esq.,  
Assistant United States Attorney, Attor-  
neys for Respondent.

**ON DEMURRER TO PETITION FOR A WRIT  
OF HABEAS CORPUS.**

The demurrer to the petition for a writ of *habeas  
corpus* herein is sustained, and said petition denied.

December 15th, 1916.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Dec. 15, 1916. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [14]

*In the District Court of the United States, in and for  
the Northern District of California, Southern  
Division, First Division.*

No. 16,118.

In the Matter of the Application of MAH SHEE on  
Habeas Corpus.

**Notice of Appeal.**

To the Clerk of the Above-entitled Court, and to the  
Hon. JOHN W. PRESTON, United States At-  
torney for the Northern District of California:

You and each of you will please take notice that  
Mah Shee, the detained herein, by Chan Leung, the  
petitioner herein, do hereby appeal to the Circuit  
Court of Appeals of the United States for the Ninth  
Circuit from the order made and entered herein on  
the 15th day of December, 1916, sustaining the de-  
murrer and denying the petition for a writ of habeas  
corpus filed herein.

Dated San Francisco, California, December 19th,  
1916.

GEO. A. MCGOWAN,  
Attorney for Petitioner, Detained and Appellants  
herein.

Due notice and receipt of a copy of the within  
Notice of Appeal is hereby admitted this 20 day of  
Dec., 1916.

JNO. W. PRESTON,  
U. S. Attorney, Northern District of California,  
Attorney for Respondent.



[Endorsed]: Filed Dec. 21, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [15]

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*In the District Court of the United States, in and for the Northern District of California, Southern Division, First Division.*

No. 16,118.

In the Matter of the Application of MAH SHEE, on Habeas Corpus.

**Petition for Appeal.**

Comes now Mah Shee, the detained, by Chan Leung, the petitioner, who are the appellants herein, and say:

That on the 15th day of December, 1916, the above-entitled Court made and entered its order denying the petition for a writ of *habeas corpus* as prayed for and filed herein, in which said order certain errors are made to the prejudice of the appellants herein, all of which will more fully appear from the assignment of errors filed herein;

WHEREFORE these appellants pray that an appeal may be granted in their behalf to the Circuit Court of Appeals of the United States for the Ninth District for the correction of the errors so complained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit. It is further prayed that during the pendency of the said appeal the said Mah Shee may be granted

her liberty and remain at large upon a bond in the sum of \$1,000, conditioned that she remains within the United States and renders herself in execution of whatever judgment is finally entered herein.

Dated San Francisco, California, December 19th, 1916.

GEO. A. McGOWAN,  
Attorney for Petitioners, Detained and Appellants  
Herein. [16]

Due service and receipt of a copy of the within Petition for Appeal is hereby admitted this 20 day of Dec. 1916.

JNO. W. PRESTON,  
U. S. Attorney, Northern District of California,  
Attorney for Respondent.

[Endorsed]: Filed Dec. 21, 1916. W. B. Maling,  
Clerk. By T. L. Baldwin, Deputy Clerk. [17]

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*In the District Court of the United States, in and for  
the Northern District of California, Southern  
Division, Division No. 1.*

No. 16,118.

In the Matter of MAH SHEE, on Habeas Corpus.

**Assignment of Errors.**

Comes now Mah Shee, the detained herein, by Chan Leung, petitioner herein, both of whom are appellants herein, by their attorney, George A. McGowan, Esquire, in connection with their petition, for a hearing herein, assign the following errors which they aver occurred upon the trial or hearing

of the above-entitled cause, and upon which they will rely, upon appeal to the Circuit Court of Appeals for the Ninth Circuit, to wit:

First. That the Court erred in denying the petition for a writ of *habeas corpus* herein.

Second. That the Court erred in not holding that it had no jurisdiction to issue a writ of *habeas corpus*, as prayed for in the petition herein.

Third. That the Court erred in not holding that the allegations contained in the petition herein, for a writ of *habeas corpus*, were sufficient in law, to justify the granting and issuing of a writ of *habeas corpus*, as prayed for in the said petition.

Fourth. That the Court erred in holding that the immigration authorities had accorded the appellant, Mah Shee, a fair hearing in the matter of her application to enter the United States.

Fifth. That the Court erred in holding that it was not an abuse of discretion and did not prevent the appellant from having a fair hearing for the immigration authorities to refuse her the [18] right to be interviewed by her attorney for the purpose of submitting additional evidence upon appeal.

Sixth. That the Court erred in holding that it was not an abuse of discretion and did not prevent the appellant from having a fair hearing for the immigration authorities to refuse to permit her to have the right of a conference and consultation with her attorney after the denial of her case by the Commissioner of Immigration, and during the pendency of the said appeal before the Department of Labor.

Seventh. That the Court erred in holding that

it was not an abuse of discretion and did not prevent the appellant from having a fair hearing for the Commissioner of Immigration to withhold from the inspection of her attorney the report and review upon which the denial of the said Commissioner was based.

Eighth. That the Court erred in holding that it was not an abuse of discretion and did not deprive the appellant of a fair hearing for the Commissioner of Immigration and the Secretary of Labor to refuse to be guided by the report of the examining Immigration Inspector, who was the only officer who came in contact with the witnesses submitting evidence in said matter, and who was the only officer who had an opportunity of observing their conduct and demeanor while upon the witness-stand.

WHEREFORE, the appellants pray that the judgment and order of the United States District Court, in and for the Northern District of the State of California, made and entered herein in the office of the clerk of said court on the 15th day of December, 1916, discharging the order to show cause and dismissing the petition for a writ of *habeas corpus* be reversed and that this cause be remitted to the said lower court with instructions to discharge the said Mah Shee from custody, or grant her a new trial before the lower court, by directing the issuance of a writ of *habeas* [19] *corpus*, as prayed for in said petition.

Dated San Francisco, California, December 19th, 1916.

GEO. A. MCGOWAN,  
Attorney for Appellants.



Due service and receipt of a copy of the within Assignment of Errors is hereby admitted this 20 day of Dec., 1916.

JNO. W. PRESTON,  
U. S. Attorney, Northern District of California,  
Attorney for Respondent.

[Endorsed]: Filed Dec. 21, 1916. W. B. Maling,  
Clerk. By T. L. Baldwin, Deputy Clerk. [20]

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*In the District Court of the United States, in and  
for the Northern District of California, South-  
ern Division, Division No. 1.*

No. 16,118.

In the Matter of MAH SHEE on Habeas Corpus.

**Order Allowing Petition for Appeal.**

On this 20th day of December, 1916, comes Mah Shee, the detained herein, by Chan Leung, the petitioner herein, both of whom are appellants herein, by their attorney, George A. McGowan, Esquire, and having previously filed herein, did present to this Court their petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by them, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper. And it appearing to the Court that the said detained having first applied

to the Immigration authorities for permission to enter the United States that the application for a writ of *habeas corpus* on her behalf was not in that sense an application in the first instance to enter the United States by the said detained, and the application of the said detained for a writ of *habeas corpus* having been seen, heard and determined by this Court that the application for appeal presented with the said petition for appeal is not an application to the Court for appeal in the first instance, and in consideration of the importance of the legal points involved in said appeal, the Court does—

IN CONSIDERATION WHEREOF, hereby allows the appeal herein [21] prayed for, and orders and directs that the order of deportation made and entered by the said Commissioner of Immigration and so affirmed by the said Secretary of Labor, and the order of remand made and entered herein be stayed, pending the hearing of the said case in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated San Francisco, California, December 21, 1916.

M. T. DOOLING,

United States District Judge.

Due service and receipt of a copy of the within order allowing appeal is hereby admitted this 21st day of December, 1916.

JNO. W. PRESTON,

U. S. Attorney, Northern District of California.

Attorney for Respondent.

[Endorsed]: Filed Dec. 21, 1916. W. B. Maling,  
Clerk. By T. L. Baldwin, Deputy Clerk. [22]

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**(Citation on Appeal—Copy.)**

UNITED STATES OF AMERICA,—ss:

The President of the United States, to EDWARD  
WHITE, Commissioner of Immigration, Port  
of San Francisco and to JOHN W. PRESTON,  
Esq., the U. S. Attorney, Greeting:

You are hereby cited and admonished to be and  
appear at a United States Circuit Court of Appeals  
for the Ninth Circuit, to be holden at the city of San  
Francisco, in the State of California, within thirty  
days from the date hereof, pursuant to an order al-  
lowing an appeal, of record in the clerk's office of  
the United States District Court for the Northern  
District of California, Southern Division, Division  
No. 1, wherein Mah Shee and Chan Leung are ap-  
pellants, and you are appellee, to show cause, if  
any there be, why the decree rendered against the  
said appellants, as in the said order allowing appeal  
mentioned, should not be corrected, and why speedy  
justice should not be done to the parties in that  
behalf.

WITNESS, the Honorable M. T. DOOLING,  
United States District Judge for the Northern Dis-  
trict of California, this 20th day of December, A. D.  
1916.

M. T. DOOLING,  
United States District Judge.

Service of the within Citation on Appeal and receipt of a copy thereof is hereby admitted this 21st day of December, 1916.

JNO. W. PRESTON,  
U. S. Attorney.

[Endorsed]: Filed Dec. 21, 1916. W. B. Maling,  
Clerk. By T. L. Baldwin, Deputy Clerk. [23]

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**(Extracts From Immigration Record.)**

McGOWAN & WORLEY,  
Attorneys and Counsellors at Law,  
Bank of Italy Building.

S. E. Corner Montgomery and Clay Streets.

Rooms 302, 303 and 304.

Telephone Kearny 3092.

San Francisco, Sept. 20, 1916.

Hon. Edward White,  
Commissioner of Immigration,  
Port of San Francisco.

Dear Sir:—

In re MAH SHEE,  
15502/7-13, ex. SS. "Tenyo Maru,"  
August 16th, 1916.

This applicant has been detained at this port since the 16th of August. She has been held incommunicado by you, and has been permitted no communication with her husband, nor he with her since said time. Her case has been denied, and such proceedings as have been had with respect thereto are now a matter of record. We have just received your letter denying our application to have the review of



the Law Section open to our inspection.

We now request an interview with this applicant with her husband as a basis for the introduction of further evidence in support of her appeal.

Yours very respectfully,

McGOWAN & WORLEY,

By GEO. A. McGOWAN,

Attorneys for Applicant.

GAMCG/s.

Referred to Mr. Wilkinson.

W. T. B.

(Time Stamp) [24]

U. S. DEPARTMENT OF LABOR.

Immigration Service.

Office of the Commissioner

San Francisco, Cal.

15502/7-13

September 25, 1916.

Messrs. McGowan and Worley,

Attorneys-at-Law,

Bank of Italy Bldg., San Francisco.

Sirs:

Replying to your letter of the 20th instant, in re Mah Shee, wife of a native, ex. SS. "Tenyo Maru," August 16, 1916, you are advised that the request contained therein, that you, as counsel, and the applicant's alleged husband be permitted to interview the applicant as a basis for the introduction of further evidence in support of her appeal, must be denied, as there is no authority, in either the law or

regulations, for such a procedure.

Respectfully,

Exact copy as signed by W. T. BOYCE,

Acting Commissioner.

Mailed this day of K.

WHW/ASH. [25]

McGOWAN & WORLEY,

Attorneys and Counsellors at Law,

Bank of Italy Building.

S. E. Corner of Montgomery and Clay Streets.

Rooms 302, 303 and 304.

Telephone Kearny 3092.

San Francisco, Sept. 27, 1916.

Hon. Edward White,

Commissioner of Immigration,

Port of San Francisco.

(Time Stamp)

Dear Sir:—

In re MAH SHEE,

wife of native, 15520/7-13,

ex. SS. "Tenyo Maru," Aug. 16, 1916.

This applicant having been held incommunicado at your station since the 16th day of August, 1916, she having been kept separate, apart, and away from her husband during all of that time the husband now desires to request that he be permitted to see, talk to, comfort and console his wife, who journeyed with

him to this country on the same boat and to whom you have denied admission.

Yours very respectfully,

McGOWAN & WORLEY,

By GEO. A. McGOWAN,

GAMcG/s.

Attorneys for Applicant.

9/27/16.

Insp. Wilkinson has case.

9/27/16.

To Miss Wilson,

CDM. [26]

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*District Court of the United States, in and for the  
Northern District of California, Southern Division,  
First Division.*

No. 16,118.

In the Matter of the Application of MAH SHEE, on  
Habeas Corpus.

**Stipulation and Order Respecting Withdrawal of  
Immigration Record.**

IT IS HEREBY STIPULATED and agreed by and between the attorney for the Petitioner and Appellant herein, and the attorney for the respondent and appellee herein, that the original immigration record in evidence and considered as part and parcel of the petition for a writ of habeas corpus upon hearing of the demurrer in the above-entitled matter, may be withdrawn from the files of the clerk of the above-entitled court and filed with the clerk of the United Circuit Court of Appeals in and for the Ninth

Circuit; there to be considered as a part and parcel of the record on appeal in the above-entitled case with the same force and effect as if embodied in the transcript of the record and so certified to by the Clerk of this Court.

Dated San Francisco, California, January 15, 1917.

GEO. A. McGOWAN,

Attorney for Petitioner and Appellant.

JNO. W. PRESTON,

United States Attorney for the Northern District of California,

Attorney for Respondent and Appellee. [27]

**Order.**

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said Immigration record therein referred to, may be withdrawn from the office of the clerk of this Court and filed in the office of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by the clerk of this Court.

M. T. DOOLING,

United States District Judge.

Dated San Francisco, California, January 15th, 1917.

Due service and receipt of a copy of the within stipulation and order is hereby admitted this 15th day of January, 1917.

JNO. W. PRESTON,

U. S. Attorney, Northern District of California,

Attorney for Respondent.



[Endorsed]: Filed Jan. 15, 1917. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [28]

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*District Court of the United States, in and for the  
Northern District of California, Southern Divi-  
sion, First Division.*

No. 16,118.

In the Matter of the Application of MAH SHEE, on  
Habeas Corpus.

**(Order Extending Time to Docket Case.)**

Good cause appearing therefor, and upon motion  
of George A. McGowan, Esquire, attorney for the  
appellant herein, it is hereby ordered that the time  
within which the record in the above-entitled cause  
may be docketed in the office of the clerk of the  
United States Circuit Court of Appeals for the  
Ninth Circuit is hereby extended for a period of  
twenty (20) days from and after the date hereof.

Dated San Francisco, California, January 12th,  
1917.

M. T. DOOLING,  
United States District Judge.

Due service and receipt of a copy of the within  
is hereby admitted this 12 day of January, 1917.

JNO. W. PRESTON,  
U. S. Attorney, Northern District of California,  
Attorney for Respondent.

[Endorsed]: Filed Jan. 12, 1917. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [29]

*District Court of the United States, in and for the  
Northern District of California, Southern Division,  
First Division.*

No. 16,118.

In the Matter of the Application of MAH SHEE, on  
Habeas Corpus.

**(Order Extending Time to Docket Case.)**

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the appellant herein, it is hereby ordered that the time within which the record in the above-entitled cause may be docketed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, is hereby extended for a period of thirty (30) days from and after the date hereof.

Dated San Francisco, California, January 31st,  
1917.

M. T. DOOLING,

United States District Judge.

The foregoing extension of time is hereby stipulated and agreed to by and between the counsel for the respective parties hereby.

JNO. W. PRESTON,

United States Attorney, Representing Respondent.

GEO. A. MCGOWAN,

Attorney for Petitioner.

[Endorsed]: Filed Jan. 31, 1917. W. B. Maling,  
Clerk. By C. W. Calbreath, Deputy Clerk. [30]

**Certificate of Clerk U. S. District Court to Transcript on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing 30 pages, numbered from 1 to 30, inclusive, to contain a full, true, and correct transcript of certain records and proceedings, in the Matter of Mar Shee, on Habeas Corpus, No. 16,118, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with "Praeceptum for Transcript on Appeal" (copy of which is embodied in this transcript), and the instructions of the attorney for the detained and appellant herein.

I further certify that the cost for preparing and certifying the foregoing Transcript on Appeal is the sum of Fourteen Dollars and Eighty Cents (\$14.80), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the Original Citation on Appeal, issued herein, page 32.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 13 day of February, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

**(Citation on Appeal—Original.)**

UNITED STATES OF AMERICA,—ss:

The President of the United States, to EDWARD WHITE, Commissioner of Immigration, Port of San Francisco, and to JOHN W. PRESTON, Esq., the U. S. Attorney, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, Division No. 1, wherein Mah Shee and Chan Leung are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 20th day of December, A. D. 1916.

M. T. DOOLING,

United States District Judge. [32]

[Endorsed]: No. 16,118. In the Southern Division of the United States District Court, for the Northern District of California, First Division. In re Mah Shee, Appellant, vs. Edward White, et al.,



Respondents. Citation on Appeal. Filed Dec. 21, 1916. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk.

Service of the within citation on appeal and receipt of a copy thereof is hereby admitted this 21st day of December, 1916.

JNO. W. PRESTON,  
U. S. Attorney.

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[Endorsed]: No. 2946. United States Circuit Court of Appeals for the Ninth Circuit. Mah Shee, by Chan Leung, Appellant, vs. Edward White, as Commissioner of Immigration at the Port of San Francisco, California, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed March 1, 1917.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals,  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

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**Certificate of Clerk U. S. District Court as to  
Original Exhibits.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the accompanying exhibits, viz., Respondent's Exhibits "A" and "B" (Immigration Record) are original exhibits, intro-

duced and filed, in the matter of Mar Shee, on Habeas Corpus, No. 16,118, and are herewith transmitted to the U. S. Circuit Court of Appeals, for the Ninth Circuit, as per order of this Court, which is embodied in transcript on appeal herewith.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of February, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk.

CMT.

[Endorsed]: No. 16,118. U. S. District Court, Northern District of California, First Division. In the Matter of Mar Shee on Habeas Corpus. Certificate of Clerk, U. S. District Court, as to Original Exhibits.

No. 2946. United States Circuit Court of Appeals for the Ninth Circuit. Certificate of Clerk U. S. District Court to Original Exhibits. Filed Mar. 1, 1917. F. D. Monekton, Clerk.



IN THE  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

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In re:

MAH SHEE, on habeas corpus,

Appellant,

vs.

EDWARD WHITE, as Commissioner, etc.

Appellee.

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Brief for Appellant

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GEO. A. McGOWAN,  
Attorney for Appellant.  
Bank of Italy Building,  
San Francisco, California.

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Filed this.....day of May, 1917.

Frank D. Monekton, Clerk.

By.....Deputy Clerk.





No. 2946

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IN THE  
United States  
Circuit Court of Appeals  
For the Ninth Circuit

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In re:

MAH SHEE, on habeas corpus,

Appellant,

vs.

EDWARD WHITE, as Commissioner, etc.

Appellee.

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Brief for Appellant

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STATEMENT OF THE CASE.

Chang Leung is a native-born citizen of the United States who returned from a temporary visit to China on the 12th day of August, 1916, on the steamer Tenyo Maru, which arrived at the port of San Francisco on said date. He was immediately ordered re-admitted into the United States as a citizen thereof, by the Commissioner of Immigration (Tr. 4, Ex. "B".)

Chang Leung was accompanied on said return trip

by his wife Mah Shee. Her application to enter the United States as the wife of a citizen thereof was heard before the Immigration Inspector Warner, under orders of the said Commissioner, and after a painstaking and thorough examination he found her to be the wife of a native-born citizen of the United States and recommended her landing as such. This recommendation was not followed by the Commissioner who disregarded the report and finding of the only officer before whom the witnesses appeared, and denied her case. (Tr. 5 and 6, Ex. "A" p. 20-1.)

A reopening was asked and granted, additional ex parte evidence was received but not made the subject of an examination, and the case was again denied.

A request was filed on September 18th, 1916 by the attorney for this couple asking that the report showing the reasons or evidence used for the denial of the wife's case be opened to his inspection, so that proper answer by evidence or argument might be made thereto. (Tr. 8, Ex. "A" p. 54-5.) Said request was denied on September 19th, 1916 (Tr. 8, 25, Ex. "A" p. 56.) A request was filed on September 20, 1916, requesting the right or privilege of the attorneys for the alien to have an interview with her with her husband, so that he might do the interpreting, so that she might be personally informed of the state and condition of her case and evidence obtained from her to submit on behalf of her appeal (Tr. 8, 9; 25 and 26, Ex. "A" p. 59.) This request was denied on September 25th, 1916. (Tr. 9; 26 and 27, Ex. "A" p. 60.)

A request was filed on September 27th, 1916, requesting permission for the husband to see, talk to and confer with and console and comfort his wife, she having traveled from China with him to this port, and having been held incommunicado ever since her said arrival. (Tr. 9 and 10; 27, Ex. "A" p. 61.) This request was denied on September 27th. (Tr. 10, Ex. "A" 62.) The appeal to the Secretary of Labor was dismissed and the appellant ordered returned to China. (Tr. 4 and 11, Ex. "A" 71-72.)

A petition for a writ of habeas corpus was filed by the husband on his own behalf and on behalf of his wife. (Tr. 3 to 12) and the Immigration Record of said detained wife was filed with the lower court on the hearing of the demurrer (Tr. 14 and 15.) The Demurrer was sustained (Tr. 16.) This appeal is taken therefrom.

### POINTS URGED.

1. That the evidence presented was of such a conclusive character that it was an abuse of discretion to refuse to be guided thereby.

2. That the hearing was unfair in that the right of counsel was so curtailed as to negative its value to the alien, and deprive her of the right to submit evidence and properly defend herself.

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## FIRST:

Upon the first point we have to submit that the steamer arrived on August 16th, the husband was examined on Thursday, August 17th, the wife was examined on Friday, August 18th, and on Monday, the 21st day of August, the husband and wife were re-examined, the case closed and reported for landing on August 22nd, Tuesday, by examining Immigration Inspector Warner. This Inspector was the only official to see the witnesses, observe their manner of testifying and their demeanor while under examination. He, as such Examining Immigration Inspector, was satisfied with the *bona fides* of the case, and reported it for landing, the Inspector having been satisfied the case should have been landed.

U. S. v. Sing Tuck et als. 194, U. S. 161.

“If the person satisfies the Inspector, he is allowed to enter the country without further trial.”

The Examining Inspector is virtually the trial court, as he alone conducts this hearing and presides thereat. The importance of such an officer is ably set forth by this Court in the case of Woey Ho vs. U. S. 109, Fed. 888, wherein it is held, p. 890:

“A court is not at liberty to arbitrarily and without reason reject or discredit the testimony of a witness upon the ground that he is a Chinaman, an Indian, a negro, or a white man. All

people, without regard to their race, color, creed or country, whether rich or poor, stand equal before the law. It is the duty of the courts to exercise their best judgment, not their will, whim or caprice, in passing upon the credibility of every witness. The question whether a witness is credible must ordinarily be determined by the tribunal before whom the witness appears, and in the decision of which that tribunal must necessarily be vested with a very wide discretion. In weighing the scales, the conduct, manner and appearance of the witness, as seen by the tribunal, often forms an important factor in enabling courts, as well as juries, to determine whether or not the witness is entitled to credit. Appellate courts are, in the very nature of the case deprived of the opportunity to apply this test, which in a doubtful case might control the judgment of the trial court."

and further showing that discretion may not be arbitrarily exercised the court further held, p. 891:

"It may be said that the present case comes nearer the border line, beyond which courts must not go\*\*\*\*"

The action of the Commissioner and the Secretary in disregarding evidence which is of a conclusive character, is an abuse of discretion:

Low Wah Suey vs. Backus 225 U. S. 460.

Ex Parte Lee Kow 161, Fed. 592.

U. S. vs. Chin Len, 187 Fed. 544.

1 Cyc. 219 and 14 Cyc. 383-4.

Sharon vs. Sharon, 75 Cal. 48.

Rothrock vs. Carr 55 Ind. 334-5.

There must be some supporting evidence to sustain a rejection by the Immigration authorities.

Whitfield vs. Hanges, 222 Fed. 745.

Ong Chew Lung vs. Burnett, 232 Fed. 853.

Chan Kam vs. U. S. 232 Fed 855.

U. S. vs. Redfern, 210 Fed. 548.

In case of the U. S. vs. Fong On 240 Fed. 234, it is held p. 235

“Except for this, the case would really be devoid of much question, if the defendant and his witness were not Chinamen. The temptation to claim citizenship is very great, no doubt, and absolute certainty I do not think the case admits of, but I must give some credence to the testi-

mony of men who, so far as one can see, have the usual ear-marks of veracity under the circumstances. If they were Italians, or Irish, or Germans, or Jews, no one would very seriously assert that I ought with justice to disregard their testimony, even where they had the burden of proof. I do not know, and surely I ought not to assume, that Chinamen are less likely to speak the truth than any one else. Until there is some authoritative requirement to the contrary, I ought not to have any preconceived notions about it."



## SECOND:

Upon the second point we have to submit that this couple journeyed to this port on the same steamer as husband and wife, associating and living together as such. From the arrival of the wife at the immigration station, they are not permitted to see or hold converse with one another. This continues all through the examination of the case before the examining Inspector, its consideration before the Commissioner, and before the Department at Washington. In other words, the wife is held incommunicado from arrival until ultimate and final action by the last authority. This upon the theory that her case is still pending in its various stages, and even the last authority, the Secretary of Labor, might direct her re-examination. All of this procedure is designed to aid the Immigration authorities in carrying out their preconceived ideas about safeguarding the supposed rights of the government but, we feel, with small regard for the rights of the human object of their extreme surveillance. The regulations give her the right of counsel. Rule five is in part as follows:

Rule 5 (b) "Applicant's counsel shall be permitted, after notice of appeal has been duly filed, to examine the record upon which the excluding decision is based, and may be loaned a copy of the transcript of testimony contained therein. \* \* The word 'record' as used in this paragraph shall not be construed to include memoranda of comment or letters of transmittal unless they con-

tain evidence additional to that in the record proper.

(c) "The notice of appeal shall act as a stay upon the disposal of the applicant until a final decision is rendered by the Secretary of Labor; and, within ten days after the excluding decision is rendered, unless further delay is required to investigate and report upon new evidence, the complete record of the case, together with such briefs, affidavits and statements as are to be considered in connection therewith, shall be forwarded to the Secretary of Labor by the officer in charge at the port of arrival, accompanied by his views thereon in writing. If, on appeal, evidence in addition to that brought out at the hearing is submitted, it shall be made the subject of prompt investigation by the officer in charge and be accompanied by his report."

It is apparent that the Immigration Inspector must hear all of the witnesses submitted. Chin Yow vs. U. S. 208 U. S. 8. When the case is denied an attorney may appear and appeal the case. The report which shows the reasons for the denial is withheld. The attorney reviews only the testimony. He feels that his client, the detained, should be re-examined on some point or points to fully develop facts which by reason of but the partial disclosure, have been held to prejudice her application. He requests that she be

examined thereon. The request is refused. He asks to be permitted to interview his client to submit *ex parte* from her evidence which the Immigration authorities were first requested to, but refused to take themselves. The wife being an alien Chinese speaking only the Chinese language, it was necessary to have some one to interpret. Who could inspire her confidence, and let her know that the attorney, previously unknown to her, had been employed for her but her husband and for this reason her husband was to be present to interpret. The Immigration office have many government interpreters, who could have been present at the interview which was sought to see that nothing improper was said, suggested or done, but notwithstanding this, the Commissioner of Immigration refused to permit the attorney to consult his own client. The regulations permit the submission of additional evidence after denial, and obviously, a proper person from whom to submit such evidence, would be from the applicant herself, but this was refused when her verbal re-examination was requested, and then the interview was also refused which would have resulted in the submission of her affidavit. The rule above quoted states that affidavits may be submitted, yet the action of the local Commissioner is to absolutely prevent the submission of an affidavit from an applicant for admission. Upon broad general grounds, we urge and present to the attention of the court that an applicant for admis-

sion is, under the regulations, entitled to the right of counsel, and this of necessity, implies the right to see and consult her counsel, possibly under safeguards, but certainly that is an unfair hearing which absolutely prevents and deprives an applicant for admission from any opportunity at all from seeing, consulting and conversing with her counsel. Such a stand is so un-American, that it is inconceivable to us how or why such a request should have been denied by the Commissioner of Immigration, or why the Secretary of Labor should have upheld such a course of procedure. Everything there is in our American system of Government which bespeaks of liberty, justice and fairness is transgressed by the course of procedure here protracted, and we feel that it should be condemned by this court.

In the case of *ex parte* Ung King Ieng, 213 Fed. 119, at page 121, the court held:

“The petitioner had no power to produce these witnesses, and if she desired to prove anything by them, or if she desired to test their knowledge of the facts to which they had testified against her, it seems to me that ordinary fairness required that she be permitted to do so. It was suggested at the argument of this question before the court that it would be a “nuisance” to permit cross-examination. Perhaps it would, but to the petitioner the whole proceeding was probably a nuisance. The rights of the petitioner may not be wholly measured by the convenience or inconvenience to the immigration officers in



affording her a fair hearing. Their efforts should be directed to the ascertainment of the truth. They have vast powers accorded them by the law, and these powers should be fairly exercised. It is not necessary, of course, that prolonged cross-examination be permitted. Much must be left to the discretion of the officer. But I am firmly of the opinion that, when the officer in this case refused to permit the petitioner's counsel to ask a single question of witnesses in attendance, and testifying to important matters against her, she did not receive that fair treatment which the law contemplates and to which she was entitled. The demurrer will be overruled and the writ issued."

In the case of *ex parte* Lee Dung Moo, 230 Fed. 746, page 747, the court held:

"It is manifest from the foregoing quotations, and indeed has also appeared from records submitted here in other cases, that the Immigration Bureau looks upon this statute, in so far as it may be applicable to persons of the Chinese race, with an unfriendly eye. The absolute citizenship therein provided for, and the rights pertaining to such citizenship, are regarded as 'at best only technical,' while to the plain language of the statute is added by construction the provision that it does not apply, unless the foreign-born child of the American citizen shall learn the English language and come to the United

States before he is 25 years of age. I conceive it to be the duty of executive as well as of judicial officers fairly and freely to administer the laws of Congress as they find them, whether they agree with the policy or purpose of such laws or not. In the instant case the very law which would entitle the applicant to admission into this country is regarded with such hostility as to be cast into the balance against him. If applicant is the son of a resident American citizen, he, too, is a citizen, and entitled to every right as such. The question of relationship should, therefore, be fairly investigated, with a view to ascertain the truth, and with a perfect willingness to admit him as a citizen under this law, instead of being investigated in a spirit hostile to the law, which, lacking the power to repeal, accomplishes the same result by denying to it effect. When one's right as a citizen is examined in that spirit, the hearing given him appears to me to be anything but fair."

The above two cases quite clearly indicate and show the spirit of hostility and slight regard at least, in those cases, characterizing the action of these same Immigration officers. This is also explained in the case of *ex parte* Leong Wah Jam, 230 Fed. 540; *ex parte*, Tom Toy Tin, 230 Fed. 747, *ex parte*, Ng Doo Wong, 230 Fed. 751.

It is respectfully submitted that the action of the Immigration authorities in the present case is vir-

tually to hold and decide that the applicant for admission is a nonentity that does not need to be considered and consulted by her counsel at all. The regulations provide for a notice of denial in the Chinese language but according to the procedure followed, that is about all that she may ever know of her case. The actual testimony presented why it was rejected and not acted upon, are considerations that more vitally affect her than any other person in the world, yet under the ruling in this case she is not permitted to know anything about the reasons why her case is denied. She is denied the right to consult her attorney, and the rights of her counsel and attorney are so limited and circumscribed, that she is deprived and prevented from any opportunity to submit evidence upon her own behalf, after the denial of her case, in clear contravention of the right contained in the regulations.

The record further discloses a request which was also denied, which shows that the husband, who journeyed from China to this country in the same boat with his wife, might not even visit and speak to her, to offer comfort and consolation even after her case had been transmitted to the Department on appeal, but he must wait under this procedure until after the month or six weeks which must elapse before the appeal would be determined by the Secretary of Labor, before he could see his wife. This is all clearly shown in the record.

Citations bearing on the right of counsel, may be found in Weeks on "Attorney and Client," page 310,

Section 145; page 335, Section 155; page 381, Section 184; page 535, Section 261; page 536, Section 262; also Bishop's New Criminal Procedure, Volume 1, Sections 299 and 301.

A further showing of unfairness contained in this case, has to do with the refusal of the Immigration authorities to confront the husband of this appellant with certain prior declarations. The brief on file in this case before the immigration officers requesting a re-opening of the case, sets forth the grounds therefore, and the additional matters about which the investigation was requested, including certain matters about which certain former testimony of the husband was construed against his wife, without giving him any opportunity of explaining the same. This is objected to, citing Jones on Evidence, 2nd edition, page 1075, wherein it is held:

“But there is hardly any more familiar practice in judicial procedure than that of impeaching witnesses by *proof* of their *former statements* which are *inconsistent with their present testimony*. Since such attempted impeachment is a direct attack upon the testimony of the witness, and may result in serious consequences, it is important that the practice should be so regular that the witness may have full *opportunity to admit, deny or explain* any statements which is thus assailed.”

In finally submitting this case we desire to say that it is, in our judgment, conclusively shown by the evi-



dence submitted in this case, that this appellant is entitled to enter the United States, as the wife of a citizen thereof, and that it was a clear abuse of discretion and disregard of the evidence for any other action to have been taken than to admit the applicant and we submit, that the action taken by the Immigration authorities, is in our judgment, based and founded upon an unjust suspicion without any foundation to support it and upon this point we direct the attention of the court to the case of *ex parte* Lam Pui reported in 217 Fed. 456, the particular part being from page 467 and 468, in which it is held:

“It is elementary that in judicial proceedings the question whether the record discloses any evidence is for the Court. The weight to be given evidence is for the trier of the issue of fact. It is also elementary that mere suspicion, conjectures, speculation, is not evidence, neither can it be made the basis for finding a fact in issue. The industry of counsel affords a number of illustrative expressions of Courts. In *People vs. Van Zile*, 143 N. Y. 372, 38 N. E. 381, Andrews, Chief Justice, says:

‘Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact.’

Judge Caldwell, in *Boyd vs. Glucklich*, 116 Fed. 131, 53 C. C. A. 451, well says:

‘The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass.’ ”

This is an admission case and not one of exclusion. In exclusion cases the right of bail exists, and of course, the object of said proceedings, has unlimited right of conference and consultation with her counsel. There is sufficient similarity in the aims, objects and purposes sought to be attained by Congress through deportation and exclusion proceedings, to require that in admission proceedings the right of counsel, which is accorded an applicant for admission, must of necessity, be at some time, when it will be of some service, and certainly during the pendency of her case, and when she yet has the right of submitting evidence on her behalf, have the opportunity of consultation with her counsel. In the present case this right was not asked until after the preliminary examination, and until after her case had been denied, and when there yet remained but the right of appeal to the Department. It was not even asked until the Executive officers had refused to conduct the re-examination requested. It was only urged as a method of procuring other evidence, when all other ways and methods had been ineffectually tried, and it is respectfully submitted that the procedure is so wrong, that it has resulted in depriving this detained to the fair though summary hearing, to which she was entitled, and the writ should therefore issue, and the case be tried upon its merits.

U. S. vs. Chin Yow, 208 U. S. 8.

Low Wah Suey vs. Backus, 225 U. S. 460.

Respectfully submitted,

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